No. 14-116

In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

v.

HYDE PARK SAVINGS BANK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID G. BAKER
236 HUNTINGTON AVE.
ROOM 306
BOSTON, MA 02115
(617) 367-4260

HANEEN KUTUB
LISS LAW, LLC
2 SEWALL AVE.
BROOKLINE, MA 02446
(617) 505-6919

JAMES A. FELDMAN
Counsel of Record
STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
JFELDMAN@LAW.UPENN.EDU

QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Carolyn A. Bankowski, Chapter 13 Trustee, was a party to the proceedings in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Louis B. Bullard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is not yet reported but is available at 2014 WL 1910868. The opinion of the bankruptcy appellate panel (App., *infra*, 18a-36a) is reported at 494 B.R. 92. The orders of the bankruptcy appellate panel denying certification to the First Circuit (App., *infra*, 16a-17a) and granting petitioner's motion for leave to appeal to the panel (App., *infra*, 37a-45a) are not reported. The opinion of the bankruptcy court (App., *infra*, 46a-75a) is reported at 475 B.R. 304.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 158 and 1291 of Title 28 of the United States Code are reprinted in the appendix to this petition. App., *infra*, 68a-71a.

STATEMENT

1. Congress designed Chapter 13 bankruptcy proceedings to enable an individual debtor with a regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over not more than three or five years, depending on the debtor's income. *Id.* The plan lists all priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims on a pro rata basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once the debtor makes all payments required by the plan, all unsecured debts are discharged, subject to certain limited exceptions. 11 U.S.C. § 1328(a). *See Nobleman* v. *Amer. Sav. Bank*, 508 U.S. 324, 327 (1993).

2. Petitioner, Louis Bullard, owns real property at 318 Union Street in Randolph, Massachusetts ("Property"). App., *infra*, 47a. Respondent, Hyde Park Savings Bank, holds a mortgage on the Property. *Id.* The mortgage secures a promissory note in the original

principal amount of $387,000 and with a maturity date of June 1, 2035. *Id.* at 1a.

On December 14, 2010, petitioner filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts. App., *infra*, 47a. On June 17, 2011, respondent filed a proof of claim in the amount of $346,006.54. *Id.* Though petitioner and respondent presented different appraisals of the Property's value, with petitioner valuing the Property at $245,000 and respondent valuing it at $285,000, both parties agree that the Property is worth substantially less than respondent's claim. *Id.*

3. Petitioner first filed his Chapter 13 plan on December 22, 2010. Pet. C.A. App. 48. He amended the plan three times to more accurately reflect the value of the Property, the claim amount, and the terms of the mortgage; the total amount owed to unsecured creditors; his intentions with respect to the bifurcation of the claim; and consequent changes in the expected payments to unsecured creditors. *See* Mots. To Amend Chapter 13 Plan (filed Mar. 14, 2011, Oct. 6, 2011, and Jan. 17, 2012). The Third Amended Plan ("Plan"), which is the subject of this case, was filed on January 17, 2012. *See* Pet. C.A. App. 1-8.

The Plan proposed a "hybrid" payment scheme, which divided petitioner's debt into a secured claim, backed by the Property, and an unsecured claim. App., *infra*, 19a n.3. The secured claim would be valued at the then-current value of the Property, under 11 U.S.C. § 506(a). *Id.* Petitioner would continue making "monthly payments, in the same amount as called for under the note, directly to [respondent]

until the secured claim was fully paid" at some time after the five-year term of the Plan. *Id.* at 20a. Because the principal value was being written down, however, the loan would mature earlier than projected under the original note. *Id.* at 20a-21a. Meanwhile, the unsecured claim, representing the "underwater" portion of the mortgage, would be paid the same pro rata share as other unsecured debts (a 5.26% "dividend") over the five-year life of the Plan and would then be discharged. Pet. C.A. App. 6.

On July 24, 2012, the bankruptcy court rejected the Plan, because it viewed a hybrid plan of this type as inconsistent with certain provisions of the Bankruptcy Code. App., *infra*, 66a. The court observed that "[s]everal bankruptcy courts in [the First C]ircuit have answered the question [*i.e.*, the validity of a hybrid plan] in the affirmative, while other courts, including the Ninth Circuit, have answered with a resounding 'no.'" *Id.* at 56a (footnotes and citation omitted).

4. On appeal, the bankruptcy appellate panel (BAP) affirmed. App., *infra*, 18a-36a.

a. Under 28 U.S.C. § 158(a)(1), a party may appeal "final judgments, orders, and decrees" of the bankruptcy court to the district court or BAP. The BAP ruled that the bankruptcy court's order denying confirmation of the plan was not final under Section 158(a)(1), because it left petitioner "free to propose an alternate plan." App., *infra*, 42a. The court, however, granted petitioner's motion for leave to appeal under 28 U.S.C. § 158(a)(3), which authorizes appeals "with leave of the court, from other interlocutory orders and decrees." App., *infra*, 22a, 45a.

The BAP construed Section 158(a)(3) to be informed by the standards generally governing interlocutory appeal of district court decisions under 28 U.S.C. § 1292(b). App., *infra*, 22a n.5, 42a. Applying those standards, the court held that the bankruptcy court's order denying confirmation "controls the outcome of the case because the appeal will decide whether [petitioner] can confirm a plan or dismiss his case." App., *infra*, 43a. The court also determined that there was "[s]ubstantial ground for difference of opinion" on the validity of hybrid plans, *id.*, and that the appeal thus presents a "difficult and pivotal question of law," because "[m]any courts within this circuit alone have addressed the issue" with disagreement on the outcome. *Id.* at 44a.

Finally, the BAP determined that the appeal would "[m]aterially advance the ultimate termination of the litigation," because "it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan." App., *infra*, 44a. Accordingly, his only option would be "to await dismissal of the case and determine whether to pursue the appeal." *Id.* Because a stay of creditors' enforcement actions might not be available at that time, "this option could potentially result in the loss of the property," which "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." *Id.* at 44a.

b. On the merits, the BAP acknowledged that "Massachusetts bankruptcy courts are split on the issue of hybrid plans," and that "[d]ecisions elsewhere are in disarray" on the issue. App., *infra*, 23a. Ulti-

mately, the BAP affirmed the bankruptcy court's decision, *id.* at 18a-36a, although its "rationale differ[ed] somewhat" from that of the bankruptcy court. *Id.* at 20a.

c. Petitioner noticed an appeal to the First Circuit. Insofar as the appeal might be viewed as interlocutory, he also requested certification of an interlocutory appeal from the BAP under 28 U.S.C. § 158(d)(2). Under that provision, the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2). If the court of appeals then provides authorization, appeal is permitted. Section 158(d)(2) is broader than Section 1292(b) because the standards of Section 158(d)(2) apply disjunctively rather than conjunctively and because the parties jointly may make the certification.

The BAP declined to certify the appeal to the First Circuit. App., *infra*, 17a. The BAP did not question its earlier holdings that the appeal involves a "controlling question of law as to which there is substantial ground for difference of opinion" and that immediate appeal "would materially advance the ultimate termination of the litigation." *Id.* at 22a-23a n.5. Instead, it merely stated without further explanation that "[a]s the Panel has rendered its Judgment

on the year-old appeal and [petitioner] has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary." *Id.* at 17a.

5. The First Circuit dismissed petitioner's appeal for lack of jurisdiction. App., *infra*, 1a-15a. The court agreed with the other courts below that "[t]he appeal presents an important and unsettled question of bankruptcy law." *Id.* at 1a; *see id.* at 4a n.1 ("a difficult, unsettled question"). Nonetheless, the court held that it lacked jurisdiction under 28 U.S.C. § 158(d)(1), which grants courts of appeals jurisdiction over only "final decisions, judgments, orders, and decrees."

The court of appeals recognized that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." App., *infra*, 6a. In the court's view, "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according to established formulae, then the remand may be considered final." *Id.* at 5a. But "when an intermediate appellate court remands a matter to the bankruptcy court for significant further proceedings, there is no final order." *Id.* (internal quotation marks omitted).

Applying that standard, the court noted that on remand petitioner "remains free to propose an alternative plan," although a hybrid plan would be foreclosed. App., *infra*, 7a. Creditors could object to any alternative plan, leading to further proceedings to resolve the objections. *Id.* at 8a. Because those proceedings would not be "mechanical or ministerial," the court concluded that the BAP's denial of plan confirmation was not final in this case. *Id.*

The court of appeals recognized that its holding left petitioner with the "unappealing" options of either proposing and obtaining confirmation of an unwanted plan and then appealing that ruling, or "allow[ing] his petition to be dismissed and appeal[ing] the dismissal." App., *infra*, 9a. But the court suggested that at an earlier stage "he could have sought certification and authorization to directly appeal the bankruptcy court's ruling to [the court of appeals] under 28 U.S.C. § 158(d)(2)," or, "had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." *Id.* The court did not address the BAP's refusal to certify the appeal to the First Circuit under Section 158(d)(2), nor did it explain how an appeal that failed to obtain certification from the BAP under the looser, disjunctive standards of Section 158(d)(2) could have satisfied the stricter, conjunctive standards of Section 1292(b).

REASONS FOR GRANTING THE PETITION

There has been an increasingly entrenched and acknowledged conflict in the courts of appeals on the appealability of denials of plan confirmation since at least 2000, and four circuits have weighed in on the issue in the last year alone. The issue, which is exceptionally important to bankruptcy practice nationwide, is squarely presented in this case and in *Gordon* v. *Bank of America*, No. 13-1416, and it warrants this Court's review.

Despite acknowledging that the term "final" in Section 158(d)(1) requires a "flexible interpretation," App., *infra*, 5a, the court of appeals held that an order

denying confirmation is not final and appealable because such an order leaves the debtor free to propose a new plan and therefore contemplates further substantive proceedings. But the same is true of *grants* of plan confirmation, which this Court and others have uniformly held appealable. The First Circuit's holding that orders denying plan confirmation are not appealable wastes judicial resources, and it unjustifiably burdens cash-strapped debtors, who must instead pursue time-consuming, cumbersome, and uncertain avenues to obtain appellate review.

Further review of the question presented is warranted, and this case presents a sound vehicle for such review. The pending petition in *Gordon* presents the same question as does this case. Unlike in *Gordon*, where all parties have agreed that denials of plan confirmation are appealable, respondent has argued that denials of plan confirmation are not appealable. In light of the full adversary presentation in this case and other factors, the Court may wish to grant review in this case in addition to *Gordon*. If not, the petition for certiorari in this case should be held and disposed of in accordance with the Court's resolution of *Gordon*.

I. THERE IS AN ENTRENCHED SIX-TO-THREE CONFLICT IN THE CIRCUITS ON THE APPEALABILITY OF DENIALS OF PLAN CONFIRMATION

Three circuits recognize that a denial of plan confirmation, like a grant of plan confirmation, is final and appealable under settled principles of finality that have long governed bankruptcy cases. The First Circuit in this case agreed with five other circuits that

denials of plan confirmation are not appealable. Only this Court's review can resolve the conflict.

A. In Three Circuits, a Debtor May Immediately Appeal a Denial of Plan Confirmation

The Third, Fourth, and Fifth Circuits allow debtors to appeal an order denying confirmation of their plan, rather than requiring them "to suffer dismissal or to waste resources on an amended plan before obtaining appellate review." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 250 (4th Cir. 2013).

1. In *Mort Ranta*, a divided panel of the Fourth Circuit held that an order denying confirmation of a Chapter 13 plan was "a final order for purposes of appeal even if the case has not yet been dismissed." 721 F.3d at 248. The court of appeals "conclude[d] that the bankruptcy court's denial of confirmation and the district court's affirmance are final orders" and that therefore "appellate jurisdiction [was] proper." *Id.* The court noted that it had long permitted *grants* of plan confirmation to be appealed by creditors or trustees, and "[b]y the same token, we have a long history of allowing appeals from debtors whose plans are *denied* confirmation." *Id.* at 245. Recognizing that the issue "has divided other circuits," the court concluded that "the bankruptcy court's denial of [the debtor's] proposed plan and the district court's affirmance are final orders for purposes of appeal." *Id.* at 246.

The court acknowledged that some other courts had treated denial of plan confirmation as nonfinal because "the debtor may propose an amended plan before the case is dismissed" on remand. 721 F.3d at

247. But the court noted that "the same can be said of a confirmation order," because "[e]ven after a plan is confirmed, the debtor is always free to propose a modification to the plan, which could substantially modify the terms of repayment and the rights of creditors." *Id.* at 248. Yet confirmation orders have always been held appealable. *See, e.g.*, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010).

The court also explained that "a contrary rule could leave some debtors 'without any real options.'" 721 F.3d at 248 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). Without the ability to appeal, the debtor would be "forced to 'choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal.'" *Id.* (quoting *Bartee*, 212 F.3d at 283). Filing an involuntarily amended plan "would waste 'valuable time and scarce resources,'" *id.* (quoting *McDow* v. *Dudley*, 662 F.3d 284, 287 (4th Cir. 2011)), and "the procedural oddity of allowing a debtor to appeal the confirmation of his or her own proposed plan raises questions regarding standing." *Id.* at 248 n.10. The alternative of dismissal risks losing the automatic stay that protects the debtor's estate and could "preclude[] [the debtor] from filing another bankruptcy petition for six months." *Id.* at 248. The court concluded that "as a practical matter, it makes little sense to deny debtors immediate appellate review simply because the case has not yet been dismissed and the debtor could propose an amended plan." *Id.*

2. In *Bartee*, the Fifth Circuit similarly held that a denial of confirmation of a Chapter 13 plan was appealable, because it "conclusively determined the substantive rights at issue and ended the dispute" over them. 212 F.3d at 283-84. The court explained that a bankruptcy court order is final and appealable if it is "a 'final determination of the rights of the parties to secure the relief they seek,' or a final disposition 'of a discrete dispute within the larger bankruptcy case.'" *Id.* at 282; *see also id.* at 283 ("final denial of the relief sought by the debtor"). Thus, because the record did "not contain any indication that the bankruptcy court intended to take any further action on the objection to the claim or the objection to confirmation," *id.* at 283, the court held that its order was final and appealable. *Id.* at 284; *see also In re Crager*, 691 F.3d 671, 675 (5th Cir. 2012) (holding that a denial of plan confirmation that finally resolves "a discrete dispute" is final and appealable).

The Fifth Circuit viewed its conclusion as "all but compelled by considerations of practicality," because without a right to appeal, "the debtor is left without any real options in formulating his plan." 212 F.3d at 283. The court recognized that other courts of appeals had held that denials of plan confirmation were not appealable. *Id.* at 282 n.6. But the court explained that it had "long rejected adoption of a rigid rule that a bankruptcy case can only be appealed as a single judicial unit at the end of the entire bankruptcy proceeding." *Id.* at 282 (internal quotation marks omitted). Indeed, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them."

Id. at 282-83 (quoting *England* v. *FDIC*, 975 F.2d 1168, 1171 (5th Cir. 1992)). Reversing such orders only after the termination of the entire case "would waste exorbitant amounts of time, money, and labor." *Id.* at 283 (quoting *England*, 975 F.2d at 1171).

3. In *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005), a divided panel of the Third Circuit held that a denial of confirmation of a Chapter 11 plan was appealable. The court explained that "[b]ecause bankruptcy proceedings are often protracted, and time and resources can be wasted if an appeal is delayed until after a final disposition," it had recognized the "policy to quickly resolve issues central to the progress of a bankruptcy." *Id.* To determine whether the denial of confirmation was final and appealable, the court applied a four-factor test that considers "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *Id.*

Under that test, appeal would be permitted here. Denial of confirmation will have an impact on the assets of the bankruptcy estate because, if no other plan is confirmable, petitioner will be forced to accept a dismissal as the price of appeal. *See* App., *infra*, 44a. There is no need for further fact-finding on remand, because the dispute over the validity of the hybrid plan is purely a matter of law. The appeal here, like the one in *Armstrong*, "would require [the appellate court] to address a discrete question of law that would have a preclusive effect on certain provisions of the Plan." 432 F.3d at 511. Finally, either of the alterna-

tives to permitting appeal now—appealing confirmation of a later, undesired plan or appealing a dismissal now—would be inefficient and wasteful, and would possibly still fail to bring the issue to the appellate court.

B. Six Circuits Require Debtors to Propose Plans They Do Not Want or Incur Dismissal in Order to Obtain Review

Six circuits hold that an order denying plan confirmation is not appealable.

1. In *Maiorino* v. *Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel of the Second Circuit held that an "order denying confirmation of the proposed [Chapter 13] plan is interlocutory only and hence not appealable," because "for all we know, the bankruptcy court may very well confirm another plan" that does not include the contested provision. *Id.* at 90-91. In *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996), the Second Circuit later acknowledged that "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." Nonetheless, *Flor* too held that the mere fact that it "cannot rule out the possibility that an alternate plan may be confirmed" precluded appeal of a denial of plan confirmation. *Id.*

2. The Sixth Circuit has also held that "a decision rejecting . confirmation [of a] plan is not a final order appealable under" 28 U.S.C. § 158(d)(1). *In re Lindsey*, 726 F.3d. 857, 859 (6th Cir. 2013). In *Lindsey*, the debtor's Chapter 11 plan had been denied on the ground that it violated the absolute-priority rule.

The Sixth Circuit held that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.* at 859 (quoting *Settembre* v. *Fid. & Guar. Life Ins. Co.*, 552 F.3d 438, 442 (6th Cir. 2009)). Because the debtor in *Lindsey* could propose a new plan, to which the creditors could object, the remand involved "[f]ar more than a few ministerial tasks[.]" *Id.* The Sixth Circuit noted that it "join[ed] four other circuits" that at that time did not permit appeals of denials of plan confirmation, while "[t]hree other circuits have gone the other way." *Id.* at 859-860.

3. The Eighth Circuit too has held that "a bankruptcy court order that 'neither confirms a plan nor dismisses the underlying petition, is not final.'" *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (quoting *Lewis* v. *United States*, 992 F.2d 767, 772 (8th Cir. 1993)). The court of appeals concluded that because "the bankruptcy court has remaining tasks that are not purely mechanical or ministerial, such as considering any amended plan that may be proposed, or determining how to dispose of the case if no confirmable plan is proposed," the denial of plan confirmation was not appealable. *Id.*; *accord In re Fisette*, 695 F.3d 803, 805-06 (8th Cir. 2012).

4. In *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997), both parties argued that the Ninth Circuit had jurisdiction of an appeal from a denial of plan confirmation. The Ninth Circuit, however, rejected the parties' arguments, categorically holding that "a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." In reaching that

conclusion, the court cited *Flor*, *Pleasant Woods*, and the Tenth Circuit's decision in *Simons*. *Id.*

5. In *In re Gordon*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416 (May 21, 2014), the Tenth Circuit reaffirmed its earlier determination in *In re Simons*, 908 F.2d 643 (10th Cir. 1990), that a district court's decision "rejecting confirmation of a reorganization plan and remanding the case to the bankruptcy court in order to enable debtors to seek confirmation of a new plan . . . was not a final decision appealable under §158(d)(1)" to the court of appeals. 743 F.3d at 723. The court noted that its rule "is contrary to the law of some other circuits," explaining that while it agreed with *Lindsey*, *Pleasant Woods*, and *Maiorino*, it disagreed with *Mort Ranta*, *Armstrong*, and *Bartee*. *Id.* at 724 n.2.

6. The First Circuit in this case also held that "[a]n order of an intermediate appellate tribunal [*i.e.*, a district court or bankruptcy appellate panel] affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." App., *infra*, 7a. The court recognized that "[t]he finality of an order denying confirmation of a reorganization plan is the subject of a circuit split." *Id.* at 6a. It aligned the circuits exactly as set forth above, *id.*, and it extensively discussed the opposing views of the Sixth Circuit in *Lindsey* and the Fourth Circuit in *Mort Ranta*. *Id.* at 7a n.5, 8a, 10a, 13a-14a.

The court of appeals stated in a footnote that "[t]he analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed," as occurred in *Gordon*.

App., *infra*, 14a n.9. But no other court has suggested that the analysis differs depending on whether the bankruptcy court initially confirmed or refused to confirm the plan, and the First Circuit appears not to have intended to make any such general distinction. Instead, in each of the cases the court cited in its discussion, *Bourne* v. *Northwood Properties*, 509 F.3d 15 (1st Cir. 2007), and *Prudential Ins. Co.* v. *SW Boston Hotel Venture*, 748 F.3d 393 (1st Cir. 2014), there was a discrete issue separate from, but crucial to, plan confirmation as to which the court held that appeal was proper. In each case, the First Circuit first decided that discrete, appealable issue. It then went on to reverse the intermediate appellate court's holding that the plan could not be confirmed, on the ground that the ruling on the separate issue "eviscerated [the] entire premise" of the intermediate court's denial of plan confirmation "and left only ministerial tasks for the bankruptcy court." App., *infra*, 14a n.9. If the only possibly appealable issue is the denial of plan confirmation, the First Circuit appears to squarely take the position that no appeal is permitted.

C. The Conflict Is Entrenched and Warrants Review

In the last year alone, four courts (the First Circuit here, the Fourth Circuit in *Mort Ranta*, the Sixth Circuit in *Lindsey*, and the Tenth Circuit in *Gordon*) have addressed the question presented and come to conflicting conclusions. The courts of appeals have repeatedly acknowledged the conflict and expressly addressed the rationales offered by sister circuits. *See Mort Ranta*, 721 F.3d at 246; *Bartee*, 212 F.3d at 282

n.6; *Lindsey*, 726 F.3d at 859-861; *Gordon*, 743 F.3d at 724 n.2; App., *infra*, 6a, 7a n.5, 10a-11a. The conflict extends to both Chapter 11 and Chapter 13 cases, and no court has distinguished between them in considering the appealability of plan denials. Only this Court's review can resolve the conflict.

II. DENIALS OF PLAN CONFIRMATION ARE FINAL AND APPEALABLE

Denials of plan confirmation are final decisions subject to appeal. A long line of decisions has established that finality in bankruptcy is a broader concept than finality in ordinary civil litigation. Congress recognized that principle when it enacted 28 U.S.C. § 158(d)(1), the statute specifically addressing bankruptcy appeals, whose terms ("final decisions, judgments, orders, and decrees") are significantly broader than the terms ("final decisions") of 28 U.S.C. § 1291, which authorizes appeals from district court in *all* cases. Unlike other forms of litigation, bankruptcy proceedings in successful Chapter 13 cases ordinarily continue for three or five years before the court issues a single, final judgment that terminates the case (*i.e.*, the debtor's discharge). Yet no court has suggested that all appeals in bankruptcy cases must wait until that time.

Precluding appeals from denials of plan confirmation could insulate a host of potential legal errors from review and harm debtors. A debtor would be able to obtain review only by invoking a cumbersome and doubtful appeal-your-own-plan procedure or an equally difficult procedure in which the debtor would move for a voluntary dismissal and then appeal from the grant of the debtor's own motion. Either of those

avenues prolongs the appeals process to the detriment of cash-strapped debtors, as well as creditors who also have a vital interest in avoiding waste of the limited resources available in the bankruptcy estate. Moreover, the very rationale that would preclude appeal of *denials* of plan confirmation would require reversal of the long-settled rule that *grants* of plan confirmation are appealable, since grants of plan confirmation also contemplate further proceedings on the merits of the bankruptcy case.

A. Some Orders in Bankruptcy Cases Are Final and Appealable Long Before the Bankruptcy Proceeding is Completed

"Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[1] *Accord* App., *infra*, 5a. In ordinary civil cases, a final, appealable judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Orders in bankruptcy, however, are

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[1] The courts of appeals have uniformly accepted that "[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation." *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989); *see, e.g.*, *Ritchie Special Credit Investments, Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *Lewis*, 992 F.2d at 772; *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990).

considered final for purposes of appeal where "they finally dispose of *discrete disputes within the larger case*," even though there may be more left for the bankruptcy court to do. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.). This broader concept of finality in bankruptcy proceedings is supported by the language of the governing statutes, as well as by this Court's holdings and the actual practice of the lower courts.

1. Sections 1291 and 158(d)(1) of Title 28 each independently authorize appeal of bankruptcy cases. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 1291 provides general authority for appeals of "final decisions of district courts" in bankruptcy and other cases. Section 158(d)(1), however, authorizes appeal in broader terms, providing for appeal from "final decisions, judgments, orders, and decrees" of district courts and of bankruptcy appellate panels. Congress's use of a broader phrase in the provision expressly addressed to bankruptcy appeals—which contains several, sometimes overlapping components ("final decisions, *judgments, orders, and decrees*")—demonstrates a broader notion of finality in bankruptcy and a broader array of judicial actions subject to appellate review.

Moreover, the term "order" in Section 158(d)(1) specifically encompasses a broader array of judicial acts than the term "decision" found in both statutes. A "decision" is "[a] judicial or agency determination after consideration of the facts and law." Black's Law Dictionary 467 (9th ed. 2009). An "order," however, "generally embraces final decrees as well as interlocutory directions or commands" and is defined more

broadly as "'the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.'" *Id.* at 1206 (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)). Congress's extension of appeal rights to final "orders," in addition to "decisions," in bankruptcy cases reflects its determination that appellate review should be available on a broader basis in bankruptcy than in other civil proceedings.

2. This Court's decisions confirm that the nature of bankruptcy proceedings warrants greater availability of appellate review than in other civil cases. Long before the modern Bankruptcy Code, this Court, in *Forgay* v. *Conrad*, 47 U.S. 201 (1848), allowed an appeal from an order requiring the transferee of certain fraudulently transferred assets to deliver them to the bankruptcy trustee. Further proceedings to assess the accounts and rents on the transferred assets still remained, and therefore even the narrow dispute between the trustee and the transferee that was part of the bankruptcy case had not been finally resolved. *Id.* at 203. But the Court held that appeal was nonetheless proper. *Id.* at 204.

Under the current Bankruptcy Code, this Court in *Howard Delivery Service, Inc.* v. *Zurich American Insurance Co.*, 547 U.S. 651 (2006), held that denial of priority status to a claim holder in bankruptcy was a final decision subject to appeal. While that ruling was just a step in the bankruptcy proceeding, the Court noted that it "effectively concluded the dispute between [the debtor] and [the particular creditor]" as a

practical matter. *Id.* at 657 n.3. The Court in *Howard Delivery* relied on then-Judge Breyer's opinion for the First Circuit in *Saco*, which explained that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*, 711 F.2d at 444).

3. The very nature of bankruptcy cases supports a broader rule of appealability than in other civil cases. Ordinary civil litigation usually ends with a single, final judgment that is relatively easy to identify and that terminates the proceedings on the merits. *Cf.* Fed. R. Civ. P. 58(a) (requiring that "[e]very judgment . . must be set out in a separate document"). By contrast, the "merits" of a bankruptcy case are not finally decided until the court conclusively determines what property belongs to the estate, how that property will be distributed among the debtor and various claimants and interest holders, and whether the debtor is, in the end, entitled to a discharge. In a successful Chapter 13 case, the court does not grant such a discharge until the debtor has made all required payments, usually for a period of three or five years. 11 U.S.C. § 1328(a); *see United Student Aid Funds*, 559 U.S. at 264. By that time, the debtor's payments have been distributed to creditors in a process that would be difficult to undo, and a host of other disputes among a variety of parties has been resolved. It would be absurd to contend that all appeals in Chapter 13 cases must wait until the end of that three- or five-year period, and no court has so held.

B. Orders Denying Plan Confirmation Are Appealable

Orders finally denying confirmation of a given plan, like orders finally granting plan confirmation, are appealable. They finally resolve a discrete dispute that frequently is decisive for the balance of the bankruptcy case. The debtor should not have to engage in a cumbersome and doubtful procedural maneuver to obtain appellate review of a plan denial. Such a requirement places an unjustifiable hurdle in the paths of debtors and may effectively preclude their ability to obtain *any* review of meritorious claims.

1. As a practical matter, precluding appeals of denials of plan confirmation would likely foreclose review of some legal errors altogether. Under the First Circuit's rule, a debtor would have only two ways to obtain appellate review as of right of the denial of plan confirmation. The debtor could move for confirmation of an amended plan that does not include the supposedly offending provision (if such a plan is available) and then appeal the bankruptcy court's grant of the debtor's own motion to confirm. Alternatively, the debtor could dismiss the case and appeal his own voluntary dismissal. As the Fifth Circuit recognized in *Bartee*, however, both choices are "fraught with unintended inefficienc[y] and other appellate pitfalls." 212 F.3d at 282 n.6; *see also* 13-1416 Br. Amici Curiae of Public Citizen and the Nat'l Ass'n of Consumer Bankruptcy Attys. 7-9.

Requiring the debtor to move for confirmation of an alternative plan (if one is available) and then seek to appeal the court's grant of the debtor's own motion

poses particular obstacles. Functionally, it may take months for a new, less attractive plan to be confirmed and then appealed; even if successful, the appeal could vindicate the debtor's legal position only "long after the [denied] plan c[ould] be revived." *Maiorino*, 691 F.2d at 95 (Lumbard, J., dissenting).[2] Moreover, the extra costs of filing a new plan and appealing confirmation of that plan would preclude many debtors from bringing meritorious challenges to faulty decisions; after all, debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. Finally, allowing the debtor to appeal a plan adopted on the debtor's own motion is in tension with the underlying principle that "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Elec. Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939); *see Deposit Guar. Nat'l Bank, Jackson,*

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[2] In the Chapter 11 context, there is a risk that the appeal-your-own-plan stratagem would be completely unavailable under the doctrine of "equitable mootness." As the Fifth Circuit has explained, equitable mootness is based on "a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994). Accordingly, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *Id.* Under any of the various standards by which courts of appeals have applied equitable mootness, the execution of a confirmed plan could operate to preclude appeal by a debtor seeking to change or revoke a plan on the ground that an earlier plan should have been confirmed.

Miss. v. *Roper*, 445 U.S. 326, 333 (1980); *Mort Ranta*, 721 F.3d at 248 n.10.

Similarly, voluntary dismissal, which would be necessary if no other confirmable plan were available or acceptable to the debtor, could cause the debtor to lose the benefit of the automatic stay, which prohibits creditors from acting to collect debts owed from the property held by the debtor or the estate. *See* 11 U.S.C. § 362(c)(2)(B). Loss of that protection could in turn change the debtor's financial circumstances substantially, favor certain creditors over others, and undermine the very purpose of filing for bankruptcy. *See* 1 Collier on Bankruptcy ¶ 1.05[1], p. 1-19 (16th ed. 2013). The dismissal could also jeopardize the debtor's ability to file a subsequent petition. *See* 11 U.S.C. § 109(g)(2) (providing that no person may be a debtor within 180 days of voluntary dismissal of his petition following a creditor's request for relief from the automatic stay).

2. This Court held in *United Student Aid Funds*, 559 U.S. at 269, that a *grant* of plan confirmation is appealable as of right. There is no basis to treat a *denial* of plan confirmation—which may raise precisely the same issue at the same stage of litigation—any differently.

a. The court of appeals rested its conclusion that a denial of plan confirmation is not final on the principle that when an intermediate appellate court (district court or BAP) "remands a matter to the bankruptcy court for significant further proceedings, there is no final order for purposes of § 158(d)," while "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according

to established formulae, then the remand may be considered final." App., *infra*, 5a. In this case, petitioner remained free after remand to file a new plan, which could be subject to further objections whose validity the bankruptcy court would then have to determine. *Id.* at 8a. The First Circuit believed that, because the remand thus contemplated future litigation and judicial determinations that are not "mechanical or ministerial," the BAP's decision was not final. *Id.*

The court of appeals' reasoning, however, applies equally to *grants* of plan confirmation, which also are usually followed by "significant further proceedings" that are neither "mechanical" nor "ministerial." "[T]he confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). All of those issues can lead to "significant further proceedings" after confirmation whose resolution is in no sense "mechanical or ministerial." App., *infra*, 8a.[3] The conclusion is inescapable that, under the court of appeals' reasoning,

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[3] Under 11 U.S.C. § 1329(a), debtors, creditors, or the trustee in a Chapter 13 case may seek to modify a confirmed plan. Additionally, the debtor receives no discharge of debts until all plan payments have been made, which will ordinarily occur three to five years after plan confirmation. *See* pp. 22-23, *supra*. Even after plan confirmation, if the debtor fails to make payments, a court may dismiss or convert a case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1274-75 (2d ed. 2009); 11 U.S.C. § 1307(c)(6).

a *grant* of plan confirmation is nonfinal and nonappealable. That conclusion is directly contrary to this Court's holding in *United Student Aid Funds* (and the uniform view of the lower courts) that grants of plan confirmation *are* appealable.

b. The claims process in typical Chapter 13 cases illustrates that point, since it usually occurs *after* plan confirmation. Unsecured creditors in all bankruptcy cases must file proofs of claim in order to receive payments from the estate. Fed. R. Bankr. P. 3002(a). A debtor who disagrees with the creditor's submission must object, and the bankruptcy court must resolve the dispute, often in an adversary proceeding. 11 U.S.C. § 502. Such claims-related proceedings can be heavily contested and in no sense mechanical or ministerial, but the preceding plan confirmation is nonetheless appealable.

Claims proceedings in a Chapter 13 case ordinarily take place *after* plan confirmation. Within fourteen days of filing a Chapter 13 petition, the debtor must propose a plan. Fed. R. Bankr. P. 3015(b). The United States Trustee then schedules a meeting of creditors, between 21 and 50 days after the petition is filed. Fed. R. Bankr. P. 2003(a). But while the court has 45 days after that meeting to hold a confirmation hearing on the debtor's proposed plan, 11 U.S.C. § 1324, creditors have 90 days after the meeting to file their proofs of claim against the debtor's estate. Fed. R. Bankr. P. 3002(c).

In this case, the confirmation process was extended by the need to file amended plans, so it occurred after the claims process had been completed. But "because of the expedited confirmation process in

Chapter 13 cases, claims litigation almost always postdates confirmation." *In re Duggins*, 263 B.R. 233, 236 (Bankr. C.D. Ill. 2001); *see In re Gordon*, 471 B.R. 614, 619 (D. Colo. 2012), *vacated on other grounds*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416. The fact that the claims process (and other further substantive proceedings) will usually occur after plan confirmation does not preclude appeal of an order confirming a plan, and it should not preclude appeal of an order denying plan confirmation either.

c. Treating denials of plan confirmation as nonfinal also has significant and unfortunate consequences for the development of bankruptcy law. In Chapter 13 cases, only debtors may propose plans. *See* 11 U.S.C. § 1321.[4] A rule that debtors are precluded from appealing denials of plan confirmation, while grants of plan confirmation are appealable as of right, *see United Student Aid Funds*, 559 U.S. at 269, creates an unfair asymmetry. In addition, such disparate treatment may ultimately lead to the development of bankruptcy precedents only through creditors' appeals, which may predictably result in a pro-creditor bias in bankruptcy law.

3. Finally, the existence of a mechanism for certified interlocutory appeals in 28 U.S.C. § 158(d)(2) (or in the narrower 28 U.S.C. § 1292) does not affect the

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[4] While the Bankruptcy Code provides that in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

availability of an appeal as of right from the denial of plan confirmation. See pp. 6-7, *supra*. Although the certified-appeal mechanism of Section 158(d)(2) provides a useful safety valve to permit appeals in appropriate cases, it is highly restricted as compared to appeals as a matter of right. This Court has recognized that certified interlocutory appeals were generally designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978)). When, as here, appeal of a bankruptcy court decision goes to a bankruptcy appellate panel rather than a district court, it is uncertain whether Section 158(d)(2) even provides authorization for a subsequent interlocutory appeal to the court of appeals. *See* App., *infra*, 4a n.3. Moreover, Section 158(d)(2) provides no help in cases that do not satisfy its standards, nor does it substitute for appeal of right in cases in which the debtor is simply unable to convince his adversaries or the courts involved that the case satisfies Section 158(d)(2)'s standards.

Indeed, in this case, the BAP certified the appeal from the bankruptcy court on the ground that "the Debtor has established the criteria for interlocutory review under 28 U.S.C. § 158(a)(3)" for appeal to it. App., *infra*, 45a. In making that determination, the court agreed with petitioner that the appeal here "controls the outcome of the case," *id.* at 43a, and that it "presents a difficult and pivotal question of law," *id.* at 44a. The BAP noted that "[m]any courts within this circuit alone have addressed the issue," and that "their conclusions are not unanimous and . this issue continues to be raised." *Id.* at 44a. As the BAP

explained, petitioner may not be able to obtain confirmation of another plan, and requiring petitioner to await a dismissal and then appeal "could potentially result in the loss of [his] property" if he cannot obtain a stay. *Id.* That "would not only irreparably harm [petitioner] but would significantly alter his incentive to pursue an appeal." *Id.* Yet, although those findings would be ample to support interlocutory appeal under Section 158(d)(2), the BAP inexplicably declined to certify such an appeal. *See id.* at 16a-17a.

III. THE ISSUE IS IMPORTANT AND SQUARELY PRESENTED

The question whether a debtor can appeal the denial of a proposed bankruptcy plan is vitally important to debtors and creditors. That issue, which is also presented in *Gordon* v. *Bank of America*, No. 13-1416, was the sole basis for the First Circuit's decision in this case. In their amicus brief in *Gordon*, Public Citizen and the National Association of Consumer Bankruptcy Attorneys note (at Br. 3 n.2) that both cases present appropriate vehicles to resolve this important issue. This case arises in a context in which the Court would have the benefit of a full adversarial presentation.

1. For at least a century, this Court has noted the role of the bankruptcy system in getting people back on their feet promptly and fairly. *See Williams* v. *U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). More recently, this Court has emphasized the need to "facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 793-94 (2010).

The rule embraced by the First Circuit will impede resolution of bankruptcy proceedings by barring immediate appeal when a plan is rejected. That rule forces cash-poor debtors to pursue a complicated, lengthy, and expensive litigation strategy if they want to obtain review of the legal rulings leading to the denial.

2. Barring appeals at the time a bankruptcy plan is rejected can lead to ongoing uncertainty in the law. This case is a prime example. The First Circuit began its opinion by noting that "[t]his appeal presents an important and unsettled question of bankruptcy law" regarding the validity of hybrid plans. App., *infra*, 1a; *see id.* at 4a n.1 ("a difficult unsettled question that [the court] ha[s] not previously addressed."). The BAP agreed, as did the bankruptcy court. *See* pp. 4, 5, *supra*. Yet the First Circuit was unable to resolve that important question (and may have difficulty resolving the issue in future cases) because of its holding that denials of plan confirmation are not appealable.

Indeed, many of the cases in the courts of appeals cited above similarly involved pure issues of law on which authority is split. In circuits permitting appeal of denials of plan confirmation, the appellate courts were able to resolve the issue, to the benefit of the parties to the case and other future cases. For example, on review of denial of plan confirmation in *Mort Ranta*, the Fourth Circuit reversed a bankruptcy court decision on whether social security payments could be included in income. It thereby set the case on proper footing on an issue of law that has arisen

elsewhere, with conflicting results.[5] *Mort Ranta*, 721 F.3d at 253-54. Similarly, the Fifth Circuit in *Bartee* noted the "magnitude and evenness of the split in authority, extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it, but it was able to resolve the issue on appeal of the denial of plan confirmation. 212 F.3d at 289. Those decisions each facilitated resolution of the case, while providing guidance on the issue for the district and bankruptcy courts in the circuit.

On the other hand, *Flor* involved "a disputed issue that [wa]s a question of first impression" and that was left unresolved by the Second Circuit's refusal to review the denial of plan confirmation. 79 F.3d at 284. The Sixth Circuit in *Lindsey* rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule, 726 F.3d at 858—an issue on which courts had expressed opposing views that had been canvassed by the bankruptcy court in that case. *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn.). The Tenth Circuit in *Gordon* similarly was unable to resolve an issue that the bankruptcy court in that case had noted had split courts around the country, was "very important for very, very many plans," and was an issue on which "we really need some guidance" from the court of appeals. 13-1416 Pet. 6 (quoting 13-

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[5] *See, e.g.*, *In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable."); *In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan.").

1416 Resp. C.A. Mem. Br. 7). This Court's review is essential to enable the courts of appeals to resolve important issues of bankruptcy law, to the benefit of debtors, creditors, and the judicial system itself.

3. Uniformity in this area is particularly important in light of the Constitution's grant to Congress of authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). At present, debtors in the Third, Fourth, and Fifth Circuits may appeal an order denying confirmation, while their peers in the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits may not. The law in the remaining circuits leaves both debtors and creditors uncertain. Review of this important question of federal law is warranted.

4. The petition for certiorari in *Gordon* v. *Bank of America*, No. 13-1416, is currently pending. This case presents an additional opportunity for the Court to address the question presented, with two differences from *Gordon*.

First, petitioners and respondents in *Gordon* agreed that the denial of plan confirmation was appealable, but the Tenth Circuit nonetheless held that it was not. *See* 743 F.3d at 724 & n.2. In this case, by contrast, petitioner argued that the denial of plan confirmation was appealable, but respondent argued that it was not. Accordingly, the Court would have the benefit of a full adversarial presentation from the parties on the merits in this case.

Second, petitioner in this case sought interlocutory appeal from the BAP. That court had previously determined that this case satisfied the standards for interlocutory appeal to the BAP, on grounds that certainly satisfy the standards of Section 158(d)(2) for appeal to the court of appeals as well. But, although all courts below agreed that the appeal presented a dispositive, important, and recurring issue on which courts have been divided, the BAP declined to certify the appeal to the First Circuit, without giving any substantial reason. App., *infra*, 16a-17a. Accordingly, this case illustrates particularly clearly that the potential availability of interlocutory appeal is inadequate to ensure that important issues crucial to bankruptcy cases reach the courts of appeals for resolution.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this case should be held pending this Court's disposition of *Gordon* v. *Bank of America*, No. 13-1416, and then disposed of accordingly.

Respectfully submitted.

DAVID G. BAKER
236 HUNTINGTON AVE.
ROOM 306
BOSTON, MA 02115
617-367-4260

HANEEN KUTUB
LISS LAW, LLC
2 SEWALL AVE.
BROOKLINE, MA 02446
(617) 505-6919

JAMES A. FELDMAN
Counsel of Record
STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
JFELDMAN@LAW.UPENN.EDU

JULY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 13-9009

IN RE LOUIS B. BULLARD, DEBTOR.

LOUIS B. BULLARD, APPELLANT,
v.
HYDE PARK SAVINGS BANK, APPELLEE.
CAROLYN A. BANKOWSKI, TRUSTEE.

Decided: May 14, 2014

Before THOMPSON, STAHL, AND KAYATTA, Circuit Judges.

STAHL, Circuit Judge:

This appeal presents an important and unsettled question of bankruptcy law that, in the case's present posture, we lack jurisdiction to resolve. Accordingly, we dismiss this appeal.

I. Facts & Background

Like many mortgagors, Appellant Louis Bullard owns real property whose value is substantially lower than the amount he still owes the mortgagee. Appellee Hyde Park Savings Bank (Hyde Park) holds a mortgage on the property that secures a promissory note in the original principal amount of $387,000

and with a maturity date of June 1, 2035. Bullard filed a Chapter 13 petition in December 2010, at which time he was current on his payment obligations to Hyde Park. Hyde Park filed a proof of claim in the amount of $346,006.54. The value of the property is disputed, but all parties agree that it is worth substantially less than the amount of Hyde Park's claim.

On January 17, 2012, Bullard filed his third amended plan. The plan, a so-called "hybrid" plan, proposed to bifurcate Hyde Park's claim into secured and unsecured portions per 11 U.S.C. § 506(a), with the secured portion being reduced to the value of the property. The plan called for paying a dividend of approximately 5.26% on the unsecured portion over sixty months under 11 U.S.C. § 1322(b)(2) and paying the secured portion according to the terms of the promissory note under § 1322(b)(5). Hyde Park objected, arguing that the plan could invoke either the modification provision of § 1322(b)(2) or the cure-and-maintain provision of § 1322(b)(5), but not both. The bankruptcy court agreed, sustaining Hyde Park's objection, denying confirmation of the plan, and ordering Bullard to file an amended plan within thirty days or else face dismissal. On Bullard's motion, the bankruptcy court continued the deadline to file an amended plan pending the outcome of his appeal.

Bullard appealed to the Bankruptcy Appellate Panel for the First Circuit (BAP). Recognizing, though disagreeing with, BAP precedent holding that denial of confirmation of a reorganization plan is not a final order appealable as of right, *see* 28

U.S.C. § 158(a)(1); *Watson v. Boyajian (In re Watson)*, 309 B.R. 652, 659 (1st Cir. BAP 2004) (per curiam), *aff'd*, 403 F.3d 1 (1st Cir. 2005), Bullard also filed a motion for leave to appeal the bankruptcy court's interlocutory order, *see* 28 U.S.C. § 158(a)(3), (b) (granting bankruptcy appellate panels discretionary jurisdiction over appeals of interlocutory orders of the bankruptcy court). The BAP granted the motion and, on May 24, 2013, affirmed the bankruptcy court's denial of confirmation (albeit with a slightly different rationale).

Bullard filed with the BAP a notice of appeal to this court and, a few days later, a motion for certification of the appeal under 28 U.S.C. § 158(d)(2), which the BAP denied. This court issued an order to show cause why the case should not be dismissed for lack of jurisdiction because the BAP's order affirming the denial of confirmation did not appear to be a final order, as required by 28 U.S.C. § 158(d)(1). After receiving Bullard's response, we determined that the case should proceed to full briefing of both the jurisdictional and merits questions.

II. Analysis

We start and, as it turns out, end with the jurisdictional question.[1] Congress has granted the courts

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[1] We note that we are considering statutory, rather than Article III, jurisdiction. We have on occasion sidestepped thorny questions of statutory jurisdiction to reach the merits of a case, but only where "precedent clearly dictates the result on the merits," *Alvarado v. Holder*, 743 F.3d 271, 276 (1st Cir. 2014), and the merits question is easily decided in favor of the party challenging jurisdiction, *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003). Because we

of appeals "jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a BAP or district court sitting in an appellate capacity in bankruptcy proceedings. 28 U.S.C. § 158(d)(1). With the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. No. 109–8, 119 Stat. 23, it extended our jurisdiction to reach direct appeals of the bankruptcy court's orders (final or interlocutory), upon certification by the bankruptcy court, district court, or BAP and authorization by the court of appeals, *see* 28 U.S.C. § 158(d)(2).[2]

Because this appeal comes to us under § 158(d)(1), we have jurisdiction only if the BAP's order rejecting Bullard's proposed plan is a final order.[3] We have noted that an order of the BAP cannot

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are presented with a difficult, unsettled question that we have not previously addressed, that route is not open to us here.

[2] Interlocutory orders of a district court sitting in an appellate capacity in bankruptcy proceedings are appealable to the court of appeals under 28 U.S.C. § 1292(b), again upon certification and authorization. This provision is inapplicable to orders of the BAP, however. *See Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 890 n. 4 (9th Cir. 1992) ("Section 1292(b), by its plain language, affords us jurisdiction only over orders made by a district judge. Our decision today recognizes that a party to a bankruptcy court proceeding who foresees the need for an interlocutory appeal must forgo the speedier appellate process afforded by the bankruptcy appellate panel."); 16 Charles Alan Wright et al., *Federal Practice and* Procedure § 3926.1.

[3] Because Bullard did not receive certification to appeal the BAP's decision to this court, we need not decide whether § 158(d)(2) authorizes an appeal from an interlocutory decision of the BAP (as opposed to the bankruptcy court) to the court of

be final unless the underlying bankruptcy court order is final. *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 4 (1st Cir. 2005). "[B]ecause bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." *Bourne v. Northwood Props., LLC (In re Northwood Props., LLC)*, 509 F.3d 15, 21 (1st Cir. 2007) (internal quotation marks omitted). This flexibility means that an order may be final even if it does not resolve all issues in the case, "but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding." *Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004). We have recognized that, when an intermediate appellate court "remands a matter to the bankruptcy court for significant further proceedings, there is no final order for purposes of § 158(d) and the court of appeals lacks jurisdiction." *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988). Conversely, "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according to established formulae, then the remand may be considered final." *Id.*

We have previously suggested that an order denying confirmation of a reorganization plan may not be a final order so long as the bankruptcy case

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appeals where certification has been granted. *See Woolsey v. Citibank, N.A. (In re Woolsey)*, 696 F.3d 1266, 1268 (10th Cir. 2012) (noting that the issue is uncertain); *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857, 858–59 (6th Cir. 2013) (suggesting that parties could have sought § 158(d)(2) certification from a district court order).

has not been dismissed and the debtor remains free to propose a modified plan. *See Watson*, 403 F.3d at 4–5. In *Watson*, the parties conceded that the bankruptcy court's order denying confirmation was not final, so this court did not expressly rule on the issue. *Id.* at 4. Instead, we held that, even if the order was not final when issued, it became final when the bankruptcy court entered an order dismissing the case. *Id.* at 5. The question thus remains open in this circuit.

The finality of an order denying confirmation of a reorganization plan is the subject of a circuit split. A pair of recent cases covers the terrain. The Sixth Circuit joined the Second, Eighth, Ninth, and Tenth[4] Circuits in holding that such an order is not final if the case has not been dismissed and the debtor remains free to propose another plan. *See Lindsey v. Pinnacle Nat'l Bank* (*In re Lindsey*), 726 F.3d 857, 859 (6th Cir. 2013). The Fourth Circuit, over a strong dissent, joined the Third and Fifth Circuits in holding that such an order can be final, even if the underlying bankruptcy case has not been dismissed. *See Mort Ranta v. Gorman*, 721 F.3d 241, 248 (4th Cir. 2013).

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[4] The Tenth Circuit's approach differs from the approach adopted by most other circuits, including this one, insofar as it does not treat finality any differently in the bankruptcy context. *See Simons v. FDIC* (*In re Simons*), 908 F.2d 643, 644 (10th Cir. 1990) (per curiam) (noting that circuit precedent interprets finality for § 158(d) purposes in accordance with traditional finality principles); *see also Gordon v. Bank of Am., N.A.* (*In re Gordon*), 743 F.3d 720, 723–24 & n. 2 (10th Cir. 2014) (reaffirming *Simons* in the face of contrary extra-circuit precedent).

Bullard urges us to eschew a rigid standard by which an order denying confirmation is per se not a final order, and, more expansively, to hold not only that such an order *can* be final, but that it should be *presumed* to be final unless the appellee can show otherwise. Hyde Park urges us to join the majority of the circuits and hold that an order denying confirmation is not a final order if the debtor may still propose an amended plan. It argues in the alternative that, even if such an order could be final, Bullard has not satisfied any flexible standard we might adopt.

The principles set forth in *Perry* and *Gould & Eberhardt* dictate the result in this case. An order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan. The rejection of Bullard's plan plainly does not "finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding,"[5] *Perry*, 391

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[5] We are not persuaded by the Fourth Circuit's determination that rejection of a proposed plan resolves the "discrete issue" of "whether [a] proposed Chapter 13 plan merits confirmation" and is therefore a final, appealable order. *Mort Ranta*, 721 F.3d at 247. Almost every bankruptcy court order resolves some discrete issue, but that is not the same as "finally dispos[ing] of all the issues pertaining to a discrete dispute within the larger proceeding," *Perry*, 391 F.3d at 285; *see also In re Comdisco, Inc.*, 538 F.3d 647, 651 (7th Cir. 2008) (distinguishing discrete issues from discrete disputes, and likening the latter to "disposition of a claim that would be final as a stand-alone suit outside of bankruptcy" (quoting *In re Morse Electric Co.*, 805 F.2d 262, 265 (7th Cir. 1986))). We have described "an order that conclusively determines a separable dispute over a creditor's

F.3d at 285, nor are the bankruptcy court's responsibilities on remand "only ministerial," *Gould & Eberhardt*, 852 F.2d at 29. The bankruptcy court gave Bullard a thirty-day deadline to file an amended plan, a deadline that, on Bullard's motion, the court continued pending the outcome of his appeal. Once Bullard files a new plan, his creditors will have an opportunity to file objections and the bankruptcy court must determine whether to sustain those objections or confirm the new plan. "Nothing about these tasks is mechanical or ministerial...." *Lindsey*, 726 F.3d at 859; see *also Gordon v. Bank of Am., N.A.* (*In re Gordon*), 743 F.3d 720, 723 (10th Cir. 2014) ("[T]he bankruptcy court will have to give creditors notice of the new amended plan, permit time for any objections, and then conduct another confirmation hearing. All of which is to say, the district court remanded the [debtors'] case to the bankruptcy court for significant further proceedings.") (internal quotation marks omitted). "Essentially everything remains unresolved in the Chapter 13 bankruptcy below.... [A]n order cannot sensibly be final when it not only fails to dismiss the underlying case but additionally advises that a party may revise its own court filings." *Mort Ranta*, 721 F.3d at 258 (Faber, J., dissenting).

Bullard argues that the ability to propose an alternative plan is illusory in this case, as the plan he proposed is the only feasible plan. He says that, if he

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claim or priority" as an example of an order resolving a discrete dispute. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 445–46 (1st Cir. 1983). In contrast, an order denying confirmation would, at most, finally resolve a discrete issue.

cannot appeal the denial of his plan, his only options are to propose an unwanted plan, object to it, and appeal its confirmation, or to allow his petition to be dismissed and appeal the dismissal. *See also Mort Ranta,* 721 F.3d at 248 (noting that the first option is inefficient and the second risks loss of the automatic stay, and thus vulnerability to foreclosure or collection activities, if a stay pending appeal is not granted); *Bartee v. Tara Colony Homeowners Ass'n* (*In re Bartee*), 212 F.3d 277, 282–83 & n. 6 (5th Cir. 2000) (same).

Bullard's options may be unappealing at this stage in the game, but he ignores the fact that Congress laid out other options for him—options that he did not pursue. He could have sought certification and authorization to directly appeal the bankruptcy court's order to this court under 28 U.S.C. § 158(d)(2). Likewise, had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b). Although neither of these routes provides for appeals as of right, they do provide a safety valve for situations in which delaying review by the court of appeals would be unjust or inappropriate. In any event, we do not think it problematic to adopt a rule that encourages, to the greatest extent possible, debtors and creditors to negotiate a mutually agreeable plan without requiring appellate intervention. That such a harmonious outcome may be unlikely or even impossible in some cases does not require adopting a different rule.

Bullard suggests that requiring him to propose

an unwanted plan or dismiss his petition is especially unwarranted in this case because his appeal presents a pure question of law that is unsettled in this circuit. However, that is precisely the scenario envisioned for certification of a direct appeal under § 158(d)(2)(A)(i).[6] We do not see how falling within a category allowing for direct appeal of an interlocutory order under § 158(d)(2) is an argument in favor of finding that the order is final under § 158(d)(1). "Why certify such issues for appeal if 'final' in § 158(d)(1) covers them anyway? And why add § 158(d)(2) to the Code in 2005 if § 158(d)(1) already did the work?" *Lindsey*, 726 F.3d at 860; *see also Mort Ranta*, 721 F.3d at 258 (Faber, J., dissenting) ("[The debtor] seeks immediate resolution of what he asserts is a novel legal issue. Assuming the debtor is correct, his case's legal novelty makes it a prime candidate for interlocutory review under 28 U.S.C. [§] 158(d)(2) or 28 U.S.C. [§] 1292(b). However, any novelty of this case's merits, and any eagerness to have this Court reach them, should not bend the judicially-crafted 'flexible finality' concept such that it renders the multiple avenues for interlocutory appeals unnecessary.").

Bullard cautions that not allowing immediate ap-

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[6] Section 158(d)(2)(A) permits a lower court to certify a direct appeal to the court of appeals if: (i) the challenged order implicates a question of law as to which there is no controlling authority, or "involves a matter of public importance"; (ii) the challenged order "involves a question of law requiring resolution of conflicting decisions"; or (iii) an immediate appeal "may materially advance the progress of the case."

peal of the denial of confirmation will cause judicial inefficiency.[7] Bullard cites *Zahn v. Fink (In re Zahn)*, 367 B.R. 654 (8th Cir. BAP 2007), as an example of a case in which a rule of non-finality caused a "waste of judicial resources ... [that] ought to give this court pause." There, the bankruptcy court denied confirmation of the debtor's original plan and the BAP dismissed her appeal as interlocutory (she does not appear to have sought leave for an interlocutory appeal under § 158(a)(3)). *Id.* at 655. The debtor then filed, and objected to, an unwanted plan, which the bankruptcy court confirmed. *Id.* at 655–56. On appeal, the BAP held that the original plan did not become final upon confirmation of the unwanted plan,

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[7] We note that concerns about inefficiency do not allow us to take jurisdiction where Congress has not given it. *See Gordon*, 743 F.3d at 724 (rejecting argument that efficiency concerns allow court of appeals to review denial of confirmation because "this court cannot take jurisdiction where none is to be had") (internal quotation marks omitted). Bankruptcy cases may demand flexibility, but, "as the Supreme Court has reminded us in construing § 158(d) and § 1291 ..., the key question is what the statute says about jurisdiction, not what the area regulated by Congress may demand." *Lindsey*, 726 F.3d at 860. Congress, through § 158(d)(2) and § 1291, has already granted the courts of appeals flexibility to hear interlocutory appeals from bankruptcy court orders in certain circumstances; Federal Rule of Civil Procedure 54(b) allows district courts to certify orders resolving particular claims or entering judgment as to particular parties as "final" for § 158(d)(1) purposes; and courts, including this one, *see Northwood Props.*, 509 F.3d at 21; *Perry*, 391 F.3d at 285, have recognized that orders resolving discrete disputes can be appealed even as the larger proceeding continues. *See Lindsey*, 726 F.3d at 860. Bankruptcy's demand for flexibility is not unmet; "[t]here is in short flexibility aplenty in this area." *Id.*

and thus was not properly before the court, *id.* at 656, and that the debtor lacked standing to appeal the confirmation of her own plan, even if unwanted, *id.* at 657. The Eighth Circuit disagreed on both counts, remanding the case back to the BAP for consideration of the unwanted and original plans. *Zahn v. Fink* (In *re Zahn*), 526 F.3d 1140, 1142–44 (8th Cir. 2008). On remand, the BAP held that the bankruptcy court erred in not confirming the original plan, vacated the confirmation of the unwanted plan, and remanded to the bankruptcy court with instructions to confirm the original plan. *Zahn v. Fink* (*In re Zahn*), 391 B.R. 840, 847 (8th Cir. BAP 2008). While this series of events was undoubtedly inefficient, much of the inefficiency was attributable to the debtor's failure to seek permissive interlocutory review in the BAP or district court (or directly to the court of appeals) when her original plan was rejected and the BAP's erroneous rulings as to standing[8] and the reviewability of the original plan after confirmation of the unwanted plan. *Zahn* does not represent inefficiency necessarily incident to a rule of non-finality.

Any rule that routinely treats the denial of con-

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[8] The majority in *Mort Ranta* was concerned that a rule treating denial of confirmation as interlocutory could raise standing problems if a debtor appealed confirmation of his own unwanted plan. 721 F.3d at 248 n. 10. As the dissent noted, this concern was "unwarranted" since the debtor would still be "a person aggrieved ... because each previous denial of confirmation—which I contend would be interlocutory—merges with the plan's final confirmation." *Id.* at 263 n. 11 (Faber, J., dissenting) (internal quotation marks omitted).

firmation as a final order would introduce its own form of inefficiency. Bullard's proposal, with its presumption of finality, would clog the appellate dockets with issues that could, and should, be decided elsewhere. "[T]here is something to be said in a day of burgeoning appellate dockets for taking care not to construe jurisdictional statutes ... with great liberality. Otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice." *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982). Or, if we were to adopt a less liberal rule requiring case-by-case, fact-intensive review, the parties and the courts would be bogged down in extended jurisdictional analyses before even approaching the merits. But "[j]urisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those merits shall be litigated." *In re Lopez*, 116 F.3d 1191, 1194 (7th Cir. 1997); *see Lindsey*, 726 F.3d at 859 ("[A] straightforward [finality] test also has the virtue of being easy to implement and resistant to time-consuming and costly side shows about the meaning of jurisdictional requirements."); *Mort Ranta*, 721 F.3d at 258 n. 6 (Faber, J., dissenting) ("[W]hether a court has jurisdiction [is] an issue that generally should not be fact-intensive or merits-based."). The clear rule we adopt today—an intermediate appellate court's affirmance of a bankruptcy court's denial of confirmation of a reorganization plan is not a final order appealable under § 158(d)(1) so long as the debtor remains free to propose an amended plan—promotes judicial efficiency and is

faithful to the limitations that Congress has placed on our jurisdiction.[9]

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[9] The analysis may differ in certain circumstances where the bankruptcy court confirmed a plan and the BAP or district court reversed. In *Northwood Properties*, the creditors filed a motion that, if granted, likely would have doomed the debtor's reorganization. 509 F.3d at 18. The bankruptcy court denied the motion and confirmed the plan. *Id.* On intermediate appeal, the district court determined that the denial of the creditors' motion was error and remanded the confirmation order for reconsideration in light of its ruling. *Id.* On further appeal to this court, we held that the bankruptcy court had correctly denied the creditors' motion. *Id.* at 22–24. We also held that, because the district court remanded the confirmation order based on its erroneous ruling as to the creditors' motion, without considering the creditors' objections to the plan, we had jurisdiction to review the bankruptcy court's confirmation order—which, of course, was a final order. *See id.* at 24–25.

We followed a similar path in *Prudential Insurance Co. of America v. SW Boston Hotel Venture, LLC* (*In re SW Boston Hotel Venture, LLC*), 748 F.3d 393, 2014 WL 1399418 (1st Cir. Apr. 11, 2014). There, the BAP reversed the bankruptcy court on a plan-dispositive issue and, on that basis alone, without considering the creditors' other objections to the plan, vacated and remanded the confirmation order. *Id.* at 416, 2014 WL 1399418 at *16. As in *Northwood Properties*, we determined that the reversal was in error. *See id.* We also held that we had jurisdiction over the BAP's remand order, even though it contemplated significant further proceedings in the bankruptcy court, because, among other reasons, our decision as to the first issue eviscerated its entire premise and left only ministerial tasks for the bankruptcy court. *Id.* at 416-17, 2014 WL 1399418 at *16–17.

III. Conclusion

For the foregoing reasons, we *dismiss* this appeal for lack of jurisdiction. All parties shall bear their own costs on appeal.

So ordered.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

BAP No. MB 12–054.

Bankruptcy No. 10–23503–WCH.

Louis B. Bullard, Debtor.

Louis B. Bullard, Appellant,

v.

Hyde Park Savings Bank, Appellee.

ORDER REGARDING APPELLANT'S REQUEST FOR CERTIFICATION TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

July 9, 2013

HAINES, U.S. BANKRUPTCY APPELLATE PANEL JUDGE.

On May 24, 2013, the Panel issued a Judgment affirming the July 24, 2012 bankruptcy court order sustaining Hyde Park Savings Bank's objection to the confirmation of Louis B. Bullard's "hybrid" chapter 13 plan. Bullard appealed the Judgment to the

U.S. Court of Appeals for the First Circuit. Subsequently, he filed with the Panel a request for certification pursuant to 28 U.S.C. § 158(d)(2), which statute provides for direct appeals of judgments, orders, and decrees of the bankruptcy court. *See* 28 U.S.C. § 158(d)(2)(A); *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 319 Fed. Appx 1, fn 1 (1st Cir. 2009).

As the Panel has rendered its Judgment on the year-old appeal and Bullard has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary.

Accordingly, the request for certification is **DENIED**.

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

BAP No. MB 12–054.
BANKRUPTCY No. 10–23503–WCH.

LOUIS B. BULLARD, DEBTOR.

LOUIS B. BULLARD, APPELLANT,
v.
HYDE PARK SAVINGS BANK, APPELLEE.

May 24, 2013

David G. Baker, Esq., Boston, on brief for Appellant.

Andrew E. Goloboy, Esq. and Ronald W. Dunbar, Jr., Esq., Boston, on brief for Appellee. Tara Twomey, Esq., on brief for amicus curiae, National Association of Consumer Bankruptcy Attorneys.[1]

Before HAINES, TESTER, and GODOY, United States Bankruptcy Appellate Panel Judges.

HAINES, Bankruptcy Judge.

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[1] We granted the motion of the National Association of Consumer Bankruptcy Attorneys, NACBA, to file an amicus curiae brief.

Louis B. Bullard appeals the bankruptcy court's order denying confirmation of his third amended chapter 13 plan. As explained below, we **AFFIRM.**

Bullard's plan proposed to bifurcate Hyde Park Savings Bank's secured claim. It sought to reduce the secured portion of the claim to the value of the collateral and to pay the balance a dividend (cents on the dollar) as an unsecured claim. At the same time, the plan proposed that the secured portion of the claim would be paid beyond the plan's term. Such plans, which attempt to take advantage of the "modification" provisions of § 1322(b)(2)[2] and the "cure and maintain" provisions of § 1322(b)(5), are often referred to as "hybrid" plans.[3]

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[2] Unless expressly stated otherwise, hereinafter all references to "Bankruptcy Code," "Code," or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

[3] One bankruptcy court has accurately defined the hybrid plan as follows:

> A hybrid plan is so-called because it is a modification plan that borrows features of the cure and maintain plan in an attempt to justify, under § 1322(b)(5), payment of the modified secured claim over a period longer than the term of the plan. In structure, a hybrid plan, like the present plan, (i) modifies the rights of a secured creditor by bifurcating its claim into secured and unsecured claims in accordance with 11 U.S.C. § 506(a), (ii) pays the unsecured claim a dividend—again, usually less than 100 percent—through the trustee over the duration of the plan, (iii) provides that the secured creditor retains the lien securing its secured claim until the payment in full of only the secured claim, (iv) cures the secured creditor's prepetition arrearage by payments through the trustee during the term of the plan, and (v) pays the secured claim (or at least so much of it as is not

The court below concluded that the plan was inconsistent with governing sections of the Bankruptcy Code and, thus, was not confirmable.[4] Although our rationale differs somewhat, we agree.

BACKGROUND

Hyde Park holds a mortgage on Bullard's residential real estate as security for repayment of a promissory note with a maturity date of June 2035. The home includes a second unit and, thus, is not exclusively his residence. His bankruptcy schedules posited that the property's value was less than what he owed Hyde Park and represented that, at filing, he was current on his payment obligations under the secured note. Neither point is in contest.

Bullard's plan proposed that Hyde Park's claim would be bifurcated; that the unsecured portion would be paid a dividend over 60 months; and that monthly payments, in the same amount as called for under the note, would be remitted directly to Hyde Park until the secured claim was fully paid. Specifically, the plan provided:

> The Confirmation Order shall effectively reduce

> paid by curing the arrearage) directly and over a period longer than the duration of the plan by maintaining the payments required by the prepetition agreement between the debtor and secured creditor until and only until those payments, in the aggregate, fully amortize the secured claim in accordance with 11 U.S.C. § 1325(a)(5)(A)(ii) [sic].

In re Pires, No. 09–18708, 2011 WL 5330772, at *4 (Bankr.D.Mass. Nov. 7, 2011).

[4] *In re Bullard*, 475 B.R. 304 (Bankr.D.Mass.2012).

> the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan.... The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors [sic] shall continue to make monthly payments as determined by the terms of the note. The Bank shall allocate principal, interest and escrow in accordance with the terms of the note. The Debtor shall file a Motion for Entry of Discharge ... which shall also include a document reflecting this adjustment of the principal balance for recording purposes. The motion will seek an accounting from the Bank to ensure that as of the date of discharge, the [sic] principal balance is consistent with the terms of the plan.
>
> In the event the case is dismissed prior to or without a discharge being entered, all payments received by the Bank from the Ch. 13 Trustee shall be applied to principal and interest in accordance with the terms of [sic] the note.

The bankruptcy court ruled, as a matter of law, that Bullard's hybrid plan was not confirmable. Bullard appealed. The bankruptcy court has continued generally the deadline for Bullard to file an amended plan, pending the outcome of this appeal.

JURISDICTION

A bankruptcy appellate panel is authorized to hear appeals "from final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)], or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." *Fleet Data*

Processing Corp. v. Branch (*In re Bank of New England Corp.*), 218 B.R. 643, 645 (1st Cir. BAP 1998) (internal quotations omitted). An interlocutory order " 'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.' " *Id.* at 646 (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). Previously, we have ruled that an order sustaining an objection to confirmation of a chapter 13 plan is not a final order if a debtor is free to propose an alternate plan. *Watson v. Boyajian* (*In re Watson*), 309 B.R. 652, 659 (1st Cir. BAP 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005) (citing *Bentley v. Boyajian* (*In re Bentley*), 266 B.R. 229, 233 (1st Cir. BAP 2001)).

Bullard moved for leave to appeal, arguing that courts in this circuit are divided on the issue whether hybrid plans can be confirmed. He asserted that, absent leave to appeal, the issue is unlikely to receive timely appellate guidance. In granting the motion, a decision which we ratify, we determined that the matter met pertinent standards for interlocutory review.[5]

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[5] Bullard had argued that review was warranted under 28 U.S.C. § 158(a)(3). In our order, we explained that the statute, as informed by 28 U.S.C. § 1292(b), authorized us to decide the appeal so long as: (1) the "order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." We concluded that because the appeal involved an interpretation of two statutes governing plan confirmation, addressed difficult and pivotal questions of law upon which

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 10 (1st Cir. 2012). The bankruptcy court's order entered was based on its determination that, as a matter of law, Bullard's plan could not be confirmed over objection. We therefore proceed to review that conclusion *de novo*. *Fed. Nat'l Mortgage Ass'n v. Ferreira* (*In re Ferreira*), 223 B.R. 258, 260 (D. R.I. 1998); *Stornawaye Fin. Corp. v. Hill* (*In re Hill*), 387 B.R. 339, 345 (1st Cir. BAP 2008).

DISCUSSION

I. Chapter 13 Modification, Maintenance, Distribution, and Discharge: Cross–Reference and Context

Massachusetts bankruptcy courts are split on the issue of hybrid plans. *Compare In re Pires*, 2011 WL 5330772, at *7, with *In re McGregor*, 172 B.R. 718 (Bankr.D.Mass. 1994). Decisions elsewhere are in disarray. *Compare In re Elibo*, 447 B.R. 359, 363 (Bankr.S.D.Fla. 2011) (adopting *McGregor*);[6] and *In re Pruett*, 178 B.R. 7, 8 (Bankr.N.D.Ala. 1995) (adopting *McGregor*) with *Enewally v. Washington*

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courts in this circuit were divided, and would materially advance the ultimate termination of the litigation, Bullard had established the criteria necessary to proceed with an interlocutory appeal.

[6] *See also* Nicole M. Mariani, *Incompatible Personalities*, 31 Am. Bankr. Inst. J. 42 n. 14 (2012) (discussing case law division as exemplified by the split in the southern district of Florida).

Mutual Bank (In re Enewally), 368 F.3d 1165, 1171–72 (9th Cir. 2004) (concluding hybrid plan incompatible with applicable Code provisions); *Columbia Nat'l Inc. v. Brown (In re Brown)*, 399 B.R. 574, 575 (D. Conn. 2008) (relying on *Koper, infra*, for proposition that § 1322 options are mutually exclusive); *In re Fortin*, 482 B.R. 35, 43 (Bankr.D.Mass. 2012) ("After careful consideration of the matter, I am convinced that the Bankruptcy Code does not permit the use of subsections (b)(2) and (5) in the same plan with respect to the same claim."); *In re Hinkle*, 474 B.R. 460, 465 (Bankr.M.D.Pa. 2012) ("Consistent with this enduring principle [that liens pass through bankruptcy unaffected], any allowable modification of the Claim must occur within the term of the Plan."); *In re Martin*, 444 B.R. 538, 545 (Bankr.M.D.N.C. 2011) (agreeing with *Enewally* and rejecting hybrid plan); *In re Valdes*, No. 09–26712–BKC–AJC, 2010 WL 3956814 (Bankr.S.D.Fla. Oct. 4, 2010) (same); *In re Russell*, 458 B.R. 731, 739 (Bankr.E.D.Va. 2010) (explaining how hybrid plan would negatively effect discharge exclusion for § 1322(b)(5) plan); *In re Bulson*, 327 B.R. 830, 847 (Bankr.W.D.Mich. 2005) (relying on *In re Stivender*); *In re Stivender*, 301 B.R. 498, 500 (Bankr.S.D.Ohio 2003) ("In other words, the invocation of § 1322(b)(5)'s cure and maintain provision does not change the fact that § 1322(b)(2)'s strip and pay provision is subject to the five year limitation of § 1322(d)."); *In re Koper*, 284 B.R. 747 (Bankr. D.Conn. 2002) ("A secured claim that is modified by a plan is plainly 'provided for' by that plan, as contemplated by Section 1325(a)(5).... the time period allowed to amortize the modified secured claim is

constrained by Section 1322(d); namely, the plan cannot provide for distributions which extend beyond five years").[7]

Though it is tempting to start with a review of the case law, to assay how a chapter 13 plan may permissibly treat a secured claim, we properly commence our inquiry with the language of the Bankruptcy Code. *See Shamus Holdings, LLC v. LBM Fin., LLC* (*In re Shamus Holdings, LLC*), 642 F.3d 263, 265 (1st Cir. 2011) ("Statutory interpretation starts—and often ends—with the text of the statute."). When a statute is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Although our conclusion today springs directly from the Bankruptcy Code's terms, we eschew a declaration that it is simply a matter of "plain meaning."[8] The answer to the puzzle posed by

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[7] Bullard asserts that the First Circuit cited *McGregor* with approval in *Lomas Mtg. v. Louis*, 82 F.3d 1, 4 n. 3 (1st Cir. 1996). In that case, the court ruled that § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which a debtor resides. While the court did cite to *McGregor*, the reference was in a string cite of cases explicating the debtors' argument as to the construction of the statute as it pertained to the issue before the court. The Third Circuit's reference to *McGregor* is comparable. *Scarborough v. Chase Manhattan Mtg. Corp.* (*In re Scarborough*), 461 F.3d 406, 411 (3d Cir. 2006). Both citations to *McGregor* were not with reference to hybrid plans.

[8] These days few things are less plain than the breadth and application of the plain meaning doctrine. *Compare, e.g., RadLAX Gateway Hotel, LLC. v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012) (meaning of § 1129(b)(2)(A) and its

Bullard's hybrid plan can be drawn from the text of all pertinent Code sections touching on treatment of secured claims in chapter 13, but doing so requires a good deal of effort.

A. Section 1322(b)(2): Modification of Creditors' Rights

Subsection § 1322(b)(2) provides:

> (b) Subject to subsections (a) and (c) of this section,[9] the plan may—...
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(2).

As Bullard's residential real estate includes a

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subparts is plain, although two out of three courts of appeals read it differently; plain meaning cannot be gleaned from "hyperliteral" reading), *with Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1110–11 (2007) (statutorily unqualified right of debtor to convert chapter 7 case to chapter 13 is, after all, qualified, notwithstanding clarity of statute's language).

A creditable doctrine of statutory interpretation should be a constant within a court's jurisprudence, rather than a tool one jurist or another pulls off the shelf when handy to foreclose reasoned argument.

[9] "[C]ourts have uniformly concluded that this is a drafting error" and that the prefatory language should read subject to subsections (a) and (d). *See In re Bullard*, 475 B.R. at 308 n. 18.

unit separate from the one in which he resides, Hyde Park's claim is not secured solely by his primary residence. Its note and mortgage are subject to modification by way of § 1322(b)(2).

"Rights" is not a defined term in the Bankruptcy Code, so we look to underlying state law to determine what creditor rights are subject to modification. *See Butner v. United States,* 440 U.S. 48, 54–55 (1979) (ownership and security interests, including the interest of a mortgagee, are created and defined by state law); *see also Barnhill v. Johnson,* 503 U.S. 393, 398 (1992). Under Massachusetts law, Hyde Park's rights are defined by the note and mortgage Bullard signed. Those documents gave Hyde Park the right to full principal repayment at a specific interest rate over a specified term, a monthly payment in a specified amount, the right to accelerate upon default, and the right to invoke the statutory power of sale. Under Massachusetts law, if a mortgage grants a power of sale, a mortgagee can exercise that power by foreclosing on property without judicial procedure so long as it proceeds pursuant to applicable statutory provisions. *See Eaton v. Fed. Nat'l Mtg. Ass'n,* 462 Mass. 569, 969 N.E.2d 1118 (2012) (citing, *inter alia,* Mass. Gen. Laws ch. 183, § 21 and ch. 244, § 14).

In his plan, Bullard proposed to modify several of Hyde Park's rights. First, he proposed to reduce the amount of principal secured by the mortgage by way of bifurcation based on valuation of the property via

§ 506(a)[10] and § 1322(b)(2).[11] He also proposed to shorten the mortgage note—to pay only the secured claim as reduced by bifurcation—although that re-

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[10] Section 506, in part, provides:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506.

[11] In his brief, Bullard contends that reducing the principal amount of the mortgage via § 506(a) is not a modification within the meaning of § 1322(b)(2). The Supreme Court specifically stated the opposite in *Nobelman:*

> The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal ..., the plan would also have to reduce the term of the note dramatically. That would be a serious modification of a contractual right.

Nobelman v. Amer. Sav. Bank, 508 U.S. 324, 331 (1993).

duced term would endure beyond the life span of the plan itself.[12] Bullard did not, however, propose to "modify" the monthly payment amount set by the note.[13]

On its face, § 1322(b)(2) includes no specific conditions or limitations on modification. It simply permits a debtor to propose a plan that modifies a creditor's rights. However, though § 1322(b)(2) is not, by itself, qualified, its operation is subject to other chapter 13 provisions. Section 1325(a)(5) imposes requirements for treatment of secured claims as conditions for confirmation.

B. The Protections of "Cramdown"

1. Requirements of § 1325(a)(5)

To obtain a confirmation order over the objection of a secured creditor, a plan must treat the applicable claim pursuant to the provisions of § 1325 as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—...
>
> (5) with respect to each allowed secured claim

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[12] Section 1322(d) limits chapter 13 plans to a maximum of five years.

[13] *See In re Bullard*, 475 B.R. at 305–06 (quoting operative terms of plan). Bullard intends to maintain the monthly payment called for by the note, without change. Whether that, coupled with the principal reduction the plan calls for is or is not a "modification" is open to question, as the reduced principal will necessarily affect interest accrual and balance amortization. For now, it is a question we need not answer, as the other modifications the plan attempts are apparent.

provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing

such claim to such holder.

11 U.S.C. § 1325(a)(5).

Under this section, Bullard's plan may be confirmed if either: (1) Hyde Park accepts the plan;[14] (2) Bullard surrenders his home;[15] or (3) Hyde Park retains the lien securing Bullard's home and receives "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim" [16] Therefore, under § 1325, unless Hyde Park accepts the plan, or Bullard surrenders his home, the plan must guarantee that the distribution on account of the secured claim must equal the present dollar value of the home as of the confirmation date, and that distribution on account of the claim must occur within five years. 11 U.S.C. § 1322(d)(1); *see* 8 *Collier on Bankruptcy*, ¶ 1325.06 (Alan N. Resnick & Henry Sommer eds. 15th ed. rev. 2006). Bullard's plan, however, proposes that payments on Hyde Park's secured claim (reduced by bifurcation) shall continue well beyond his plan's five-year term.

2. Distribution period exception for § 1322(b)(5)

Citing § 1322(b)(5) and *In re McGregor*, Bullard argues that the five-year limit imposed by § 1322(d)(1) on the distribution made to Hyde Park does not apply. Section 1322(b)(5) provides:

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[14] 11 U.S.C. § 1325(a)(5)(A).

[15] 11 U.S.C. § 1325(a)(5)(C).

[16] 11 U.S.C. § 1325(a)(5)(B)(i)–(ii).

> (b) Subject to subsections (a) and (c) of this section, [17] the plan may—...
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due; ...

11 U.S.C. § 1322(b)(5).

Bullard asserts that elements of §§ 1322(b)(2) and (5) may be combined, allowing a plan to modify the rights of a secured creditor *and* extend distribution on that creditor's secured claim past the life of the plan, so long as there is "maintenance of payments" as bargained for in the underlying mortgage documents. To Bullard, "maintenance of payments" means he need only pay Hyde Park the same amount every month as he did pre-petition, with the same allocation to interest and principal. He argues this "hybrid plan" is permissible as there is no explicit prohibition from combining the two sections within § 1322(b): since they have not been drafted to be expressly "mutually exclusive," he can meld them in his plan.

This much is true: § 1322(b) does not expressly prohibit combining subparagraphs (2) and (5) to treat a single secured claim. But that is not the whole story. Section 1322 does not exist in a vacuum. Read in conjunction with other sections of the Code,

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[17] *See infra* note 9.

Bullard's insistence that secured claim reduction-by-bifurcation and beyond-plan distributions in respect to such a claim can coexist must fall.

C. The Interplay of §§ 1328 and 1325

Combining §§ 1322(b)(2) and (5) results in a plan that cannot comport with the requirements of § 1325(a)(5)(B)(i)(I), and is, therefore, unconfirmable. Courts must apply § 1325(a)(5)(B)(i)(I) when the holder of an allowed secured claim objects to its treatment under a plan and the debtor is not surrendering the underlying collateral. Specifically, it states that: "(I) the holder of such claim retain the lien securing such claim until the earlier of—(aa) the payment of the *underlying debt determined under nonbankruptcy law;* or (bb) discharge under section 1328." 11 U.S.C. § 1325(a)(5)(B)(i)(I) (emphasis added.).

The nonbankruptcy law that defines Bullard's debt to Hyde Park is Massachusetts law. Thus, the mortgage and note describe and determine the "underlying debt." Here, the "underlying debt" is the entire outstanding obligation secured by Bullard's home. It is not, as Bullard argues, the amount of the bank's allowed secured claim. An "allowed secured claim" is native—and exclusive to—the bankruptcy habitat. It does not exist outside of the federal scheme.

Therefore, in order for his treatment of Hyde Park's claim to be confirmable, Bullard's last hope is § 1325(a)(5)(B)(i)(I)(bb), which would dictate satisfaction of the bank's lien on discharge. But his plan simply ignores its operation. Rather, chapter 13's

discharge provision reinforces our conclusion that Bullard's hybrid plan must fail. Section 1328 provides for several possible outcomes of a case, but importantly here, it specifically states that debts "provided for" under § 1325(a)(5) are excepted from discharge:

> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, *except any debt—*
>
> *(1) provided for under section 1322(b)(5)[.]*

11 U.S.C. § 1328(a)(1) (emphasis supplied).

"Provided for" is not a defined term in the Code, but the Supreme Court has said that:

> As used in § 1328(a), that phrase is commonly understood to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim.... [Section] 1328(a) unmistakably contemplates that a plan "provides for" a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5).

Rake v. Wade, 508 U.S. 464, 474 (1993).

Bullard's plan clearly "provides for" Hyde Park's claim under § 1322(b)(5), indeed, he has invoked § 1322(b)(5) in his cause, and, therefore, the mortgage debt will not be discharged on plan completion. As a consequence, Hyde Park will continue thereafter to retain its lien securing that debt. 11 U.S.C.

§ 1325(a)(5)(B)(i)(I).

In effect, § 1328(a)(1) establishes that as long as a plan employs § 1322(b)(5), it can *only* be confirmed over the creditor's objection via § 1325(a)(5)(B)(i)(I)(aa). And, since that section states the debt, *as determined by nonbankruptcy law*, must be paid, a debtor may not use it *and* bifurcate the applicable claim via § 506(a). To do so would render § 1325(a)(5)(B)(i)(I) ineffective. *See Rake v. Wade*, 508 U.S. at 471.[18]

II. Other Perspectives from Within the Code

As explained above, Bullard's plan is not confirmable when the pertinent provisions of chapter 13 are given their effect. Our conclusion is reinforced by the content of other rehabilitation chapters within the Code. Both chapter 11[19] and chapter 12[20] expressly provide debtors with the ability to obtain the two-fisted restructuring (claim modification via bifurcation coupled with payment extension) that Bullard craves. It is telling that Congress has demonstrated the ability to craft internally con-

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[18] "We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid deny[ing] effect to a part of a statute, we accord significance and effect ... to every word." *Rake v. Wade*, 508 U.S. at 471 (citing *Ex parte Public Nat'l Bank of NY*, 278 U.S. 101, 104 (1928); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)) (internal quotations omitted).

[19] *See* 11 U.S.C. §§ 1123(a)(5)(E), (G), (H); (b)(5); 11 U.S.C. § 1129(a)(9).

[20] *See* 11 U.S.C. §§ 1222(b)(2) and (9); 11 U.S.C. § 1225(a)(5)(B)(i).

sistent schemes to provide such relief elsewhere in the Code, but has not provided it to chapter 13 debtors.

CONCLUSION

Bullard's hybrid plan cannot be confirmed. The plan cannot employ both § 1322(b)(2) and (5) to reduce Hyde Park's secured claim and, at the same time, pay that secured claim over a period beyond the plan's term. Accordingly, we **AFFIRM**.

APPENDIX D

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

BAP No. MB 12–054.

Bankruptcy No. 10–23503–WCH.

Louis B. Bullard, Debtor.

Louis B. Bullard, Appellant,

v.

Hyde Park Savings Bank, Appellee.

ORDER GRANTING MOTION FOR LEAVE TO APPEAL

September 17, 2012

HAINES, U.S. BANKRUPTCY APPELLATE PANEL JUDGE.

Louis B. Bullard (the "Debtor") has filed a motion seeking authorization to appeal the interlocutory order denying confirmation of his chapter 13 plan. For the reasons set forth below, the Motion is **GRANTED**.

BACKGROUND

The essential facts underlying this appeal are set forth in the bankruptcy court's Memorandum of Decision, *see In re Bullard*, Case No. 10-23503-WCH, 2012 WL 3018055 (Bankr. D. Mass. July 24, 2012), and we adopt them for purposes of this order, recounting only those which are pertinent to our discussion of jurisdiction.

The Debtor filed for relief under chapter 13 in December 2010. On Schedule A, the Debtor listed a fee simple interest in a house located in Randolph, Massachusetts. He disclosed that the house was subject to the undersecured claim of Hyde Park Savings Bank.[1] Shortly thereafter, the Debtor filed his first chapter 13 plan, titled First Amended Chapter 13 Plan. In it, he explained that he intended to bifurcate Hyde Park's claim pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2) and pay only the unsecured portion through the plan.

In March 2011, the Debtor filed his Preconfirmation First Amended Chapter 13 Plan. With respect to Hyde Park's claim, this plan provided a few new details about the claim and adjusted the values somewhat. Before the bankruptcy court could rule on the objection Hyde Park interposed to the plan, the Debtor filed his Second Amended Chapter 13 Plan. In his motion to approve the same, the

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[1] In the Memorandum of Decision, the bankruptcy court explained that the value of the property, while in dispute, did not need to be decided for purposes of its ruling. It wrote that notwithstanding the differing values the parties presented, Hyde Park's claim exceeded the property's value.

Debtor explained that he was filing this plan to describe more accurately Hyde Park's claim and his treatment of the claim under the plan. Hyde Park again objected and, in January 2012, the Debtor filed his Third Amended Chapter 13 Plan (the "Plan"). In the motion requesting authority to file the Plan, the Debtor explained that he wanted to augment both the value of the property based upon a recent appraisal and the dividend to unsecured creditors. The Debtor again explained that he was bifurcating the claim pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2). He proposed to pay the secured portion of the claim "in accordance with the original terms of the contract underlying such claim" and pay 5.26 percent of the unsecured portion similar to other unsecured claims. The Plan then provided as follows:

> The Confirmation Order shall effectively reduce the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors [sic] shall continue to make monthly payments as determined by the terms of the note. The Bank shall allocate principal, interest and escrow in accordance with the terms of the note. The Debtor shall file a Motion for Entry of Discharge which shall also include a document reflecting this adjustment of the principal balance for recording purposes.
>
> In the event the case is dismissed prior to or without a discharge being entered, all payments received by the Bank from the Ch. 13 Trustee

shall be applied to principal and interest in accordance with the terms of the note.

Hyde Park objected to the Plan, in part, because it allegedly violated the provisions of § 1322(b)(5) and a recently issued decision interpreting the statute. See *In re Pires*, No. 09-18708, 2011 WL 5330772 (Bankr. D. Mass. Nov. 7, 2011). In his response, the Debtor argued, in part, that his treatment of Hyde Park's claim was consistent with longstanding precedent in the district. See, e.g., *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994).

The court took the matter under advisement and the parties filed supplemental briefs. In his, the Debtor explained that the property comprises two units, one of which is his residence. The Debtor explained why his plan complies with cases such as *In re McGregor*, and does not run afoul of *In re Pires*. In its brief, Hyde Park explained that a chapter 13 debtor has only two options in crafting a plan: 1. to cure any deficiency and maintain monthly payments; or 2. to modify and lien strip. Hyde Park contends that the Debtor's attempt to provide a third option, a hybrid plan, runs afoul of the applicable Bankruptcy Code provisions and case law.

On July 24, 2012, the bankruptcy court issued a Memorandum of Decision addressing the Plan and Hyde Park's objection. In it, the court outlined the statutes applicable to chapter 13 plans and the history of "hybrid plans" in this circuit. The court recognized that in several decisions, bankruptcy courts in this circuit have approved such plans. The court then discussed the courts that have disagreed and

reasons why it adopted those decisions. Accordingly, the court issued an order sustaining Hyde Park's objection to the Plan and ordering the Debtor to file a further amended plan within one month failing which the court would dismiss the case. Pursuant to the Debtor's motion, the court continued generally the deadline to file an amended plan pending the outcome of this appeal.

After appealing the order, the Debtor filed a motion seeking leave to appeal. In it, he detailed how courts in this circuit are divided on this issue and further asserted that absent leave to appeal, the issue is unlikely to receive further appellate guidance.[2] He also offered that he has no alternative basis on which to propose a further amended plan. The Debtor contends that because the order involves a controlling issue of law as to which there is substantial grounds for difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation, his request for leave to appeal should be granted. We agree.

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[2] The Debtor noted that the BAP recently dismissed a similar appeal as interlocutory and not subject to an applicable exception. *Pires v. America's Servicing Co. (In re Pires)*, B.A.P. MB 11-090 (B.A.P. 1st Cir. March 15, 2012). In the Judgment of Dismissal, we explained that because the debtor had not illuminated the grounds for the Panel to grant interlocutory review in his response to our show cause order, we could not exercise our discretion to let the appeal proceed. Based upon the contents of the Debtor's motion and memorandum, and as further highlighted below, the Debtor has provided the necessary illumination.

DISCUSSION

A bankruptcy appellate panel is authorized to hear appeals "from final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)], or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998) (internal quotations omitted). An interlocutory order "'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. at 646 (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). As the Debtor correctly recognizes, typically an order denying confirmation of a chapter 13 plan is not a final order if a debtor is free to propose an alternate plan. *Watson v. Boyajian (In re Watson)*, 309 B.R. 52, 659 (B.A.P. 1st Cir. 2004), aff'd, 403 F.3d 1 (1st Cir. 2005) (citing *Bentley v. Boyajian (In re Bentley)*, 266 B.R. 229, 233 (B.A.P. 1st Cir. 2001)).

In his motion and accompanying memorandum, the Debtor outlines how 28 U.S.C. § 158(a)(3) provides us authority to consider the appeal of the order. Under that statute, as informed by 28 U.S.C. § 1292(b), we consider whether (1) the "order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Bank of New England*, 218 B.R. at 652.

1. Controlling issue of law

The Panel has previously held that a ruling involves a controlling question of law if it "controls the outcome of the underlying case." *Id.* Based on this standard, we have previously permitted interlocutory review of orders denying chapter 13 plan confirmation in cases where the issues involved unsettled question of law under the newly enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). *See, e.g., Flynn v. Bankowski (In re Flynn)*, 402 B.R. 437, 442 (B.A.P 1st Cir. 2009); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302, 304 (B.A.P. 1st Cir. 2007). In those cases, resolution of the issues would decide whether the debtors could confirm their plans or would have to dismiss their cases.

In his motion, the Debtor explains that the issue presented on appeal, an interpretation of the statutes governing the confirmation of a chapter 13 plan which includes an undersecured claim, controls the outcome of the case because the appeal will decide whether he can confirm a plan or dismiss his case. Although these statutes and the cases interpreting the same pre-date BAPCPA, the issue they raise are similar to the issues presented in *Flynn* and *Kibbe* and affect whether the result will be confirmation or dismissal.

2. Substantial ground for difference of opinion

We have held that the appeal must present "one or more difficult and *pivotal* questions of law not settled by controlling authority." *In re Bank of New*

England Corp., 218 B.R. at 653 (emphasis in the original). Many courts within this circuit alone have addressed the issue presented on appeal. *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. 258 (D. R.I. 1998); *In re Bullard*, *supra*; *In re Pires*, *supra*; *In re Plourde*, 402 B.R. 488 (Bankr. D. N.H. 2009); *In re Veliz*, No. 08-13292, 2009 WL 3418638 (Bankr. D. R.I. Oct. 16, 2009); *In re Kheng*, 202 B.R. 538 (Bankr. D. R.I. 1996); *In re Murphy*, 175 B.R. 134 (Bankr. D. Mass. 1994); *In re Brown*, 175 B.R. 129 (Bankr. D. Mass. 1994); *In re McGregor, supra*. Given that their conclusions are not unanimous and that this issue continues to be raised, we conclude that the appeal presents a difficult and pivotal question of law.

3. Materially advance the ultimate termination of the litigation

The Debtor argues that an interlocutory appeal will advance the conclusion of this litigation because it will result in either instruction to confirm the Debtor's plan or the Debtor seeking dismissal of the case. As the Debtor has filed numerous plans without obtaining confirmation, it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan.

The only other option available to debtors in this situation is to await dismissal of the case and determine whether to pursue the appeal. If a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property. Such an outcome would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal. The Panel does not

consider the review of this issue to warrant such a risk.

CONCLUSION

Although the Order is interlocutory, the Debtor has established the criteria for interlocutory review under 28 U.S.C. § 158(a)(3) and the motion is hereby granted.[3]

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[3] The Panel notes that we decide the issue of finality only for purposes of continuing with the appeal. A Panel deciding the case on the merits may reconsider the issue.

APPENDIX E

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS, EASTERN DIVISION

IN RE LOUIS B. BULLARD.

No. 10–23503–WCH.

July 24, 2012.

MEMORANDUM OF DECISION

WILLIAM C. HILLMAN, BANKRUPTCY JUDGE.

I. *INTRODUCTION*

The matter before the Court is the "Objection to Confirmation of Third Amended Chapter 13 Plan" (the "Objection") filed by Hyde Park Savings Bank ("Hyde Park") and the "Response to Objection to Confirmation of Plan by Creditor Hyde Park Savings Bank" (the "Response") filed by Louis B. Bullard (the "Debtor"). The question presented by the Objection is whether a debtor through his Chapter 13 plan may bifurcate a secured creditor's claim and then pay the secured portion of the claim over a period longer than the maximum five year term of a Chapter 13

plan.[1] For the reasons set forth below, I find that such treatment is incompatible with the provisions of the Bankruptcy Code and will sustain the Objection.

II. *BACKGROUND*

The facts necessary to resolve this issue are straightforward and undisputed. The Debtor owns real property located at 318 Union Street in Randolph, Massachusetts (the "Property"). Hyde Park holds a mortgage on the Property which secures a promissory note in the original principal amount of $387,000 and a maturity date of June 1, 2035.[2] The Debtor commenced the present case by filing a Chapter 13 petition on December 14, 2010. On June 17, 2011, Hyde Park filed a proof of claim in the amount of $346,006.54. The proof of claim does not reflect the existence of any prepetition arrears. Although the parties do not agree as to the current value of the Property, the Debtor and Hyde Park each providing competing appraisals in the amounts of $245,000 and $285,000, respectively, it is undisputed that the Property's value is substantially less than Hyde Park's claim.

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[1] The Objection also challenges the Debtor's valuation of the real property that is subject to Hyde Park's secured claim, but the parties agreed that this issue would be deferred pending a ruling on the permissibility of the Debtor's proposed treatment of Hyde Park's claim.

[2] At the hearing on the Objection, Hyde Park stated that it had no objection to bifurcation based upon the "nature" of the Property. I understand this to mean that Hyde Park's claim is not "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

On January 7, 2012, the Debtor filed the Third Amended Chapter 13 Plan (the "Plan"). Through the Plan, the Debtor proposes to bifurcate Hyde Park's secured claim into secured and unsecured components, further providing that:

> [t]he Confirmation Order shall effectively reduce the secured claim held by Hyde Park Savings Bank to the value of the real estate securing the loan (318 Union St. Randolph MA). The unsecured portion of the claim shall be treated consistently with all other claims in this plan. Pursuant to Section 1322(b)(5) the Debtors shall continue to make monthly payments as determined by the terms of the note.... [3]

Under the Plan, the unsecured portion of Hyde Park's claim would receive a dividend of approximately 5.26%. The payments on the secured portion of the claim would be paid directly by the Debtor to Hyde Park.

On February 16, 2012, Hyde Park filed the Objection. The Debtor filed the Response on March 1, 2012. I conducted a hearing on the Objection on April 26, 2012, and at the conclusion of oral arguments, took the matter under advisement. After the hearing, the parties each filed supplemental memoranda of law.

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[3] Plan, Docket No. 77 at 4.

III. *POSITIONS OF THE PARTIES*

Hyde Park

Hyde Park argues that the Bankruptcy Code affords Chapter 13 debtors only two options for the treatment of secured claims: (1) cure any arrearage and maintain payments under 11 U.S.C. § 1322(b)(5); or (2) modify the rights of the holder of the secured claim pursuant to 11 U.S.C. § 1322(b)(2) and pay the claim in full during the term of the plan. Citing *In re Pires*[4] and *In re Bell*,[5] Hyde Park asserts that courts have consistently rejected "hybrid plans" like the one proposed by the Debtor and sanctioned by *In re McGregor*[6] and its progeny which seek to combine those two options. As such, Hyde Park contends that the Plan cannot be confirmed because the Debtor impermissibly seeks to both modify its claim and maintain payments for a period exceeding the duration of the Plan.

The Debtor

While the Debtor concedes that the Plan is what is commonly referred to as a "hybrid plan," he denies that he proposes to modify Hyde Park's rights pursuant to 11 U.S.C. § 1322(b)(2). Instead, the Debtor asserts that he is doing no more than what is expressly permitted by 11 U.S.C. § 1322(b)(5), as set forth in *In re McGregor*. He contends that the issue

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[4] *In re Pires*, No. 09–18708–FJB, 2011 WL 5330772 (Bankr.D.Mass. Nov. 7, 2011).

[5] *Bell v. Bankowski* (*In re Bell*), No. 10–10870–DJC, 2011 WL 2712755 (D. Mass. July 12, 2011).

[6] *In re McGregor*, 172 B.R. 718 (Bankr.D.Mass.1994).

now before me hinges on the meaning of the phrase "modify the rights of holders of secured claims" contained in 11 U.S.C. § 1322(b)(2), and that Hyde Park's position is inconsistent with the definition of an "allowed secured claim" and otherwise ignores the distinction between a modification of "rights" and a modification of "claims."

The Debtor begins with the premise that 11 U.S.C. § 506(a) defines the nature of a secured claim such that an allowed secured claim is only secured to the extent of the value of the property securing it. As such, he argues a plain reading of the statute not only permits, but necessitates bifurcation of an undersecured claim into secured and unsecured portions based upon the value of the property. "To claim otherwise," the Debtor urges, "would not only go against common sense, but also negate the clearly defined provisions of 506(a) of the Bankruptcy Code."[7]

With this in mind, the Debtor submits that because

> section 506(a) permits bifurcation of a claim into secured and unsecured portions, it stands to reason that section 1322(b)(5) cannot be construed other than to allow the Debtor to continue the contractually due payments on the secured portion of the bifurcated claim beyond the term of the plan pursuant to the terms of the underlying contract. To interpret otherwise, would render

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[7] Debtor's Memorandum of Law in Support of Bifurcation of a First Mortgage on a Multi–Family Principal Residence Property ("Debtor's Memorandum"), Docket No. 95 at 4.

section 1322(b)(5) moot.[8]

He relies on *In re McGregor* for the proposition that "[subsection (b)(5)'s] command is complied with so long as payments are maintained on the secured claim."[9] The alternative, the Debtor maintains, "would require the Debtor to pay all debts ... during the life of the plan, which in most cases, would be impossible and ultimately defeat the purpose and intent of Chapter 13...."[10] He concludes:

> In sum, to equate bifurcation of a claim into secured and unsecured portions pursuant to 506(a) with modification of a creditor's rights pursuant to section 1322(b)(2) would not only be inaccurate, but prejudicial. Such an interpretation would nullify section 506(a) and allow the secured creditor to redefine the nature of its claim and treat an otherwise unsecured claim, as defined by the code, as a secured claim. Such an outcome would unfairly prejudice the general unsecured creditors and provide the secured creditor with an unfair advantage.[11]

IV. *DISCUSSION*

As recognized by Chief Judge Bailey of this district in *In re Pires,* "Chapter 13 offers two distinct and well-established options for treatment of secured

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[8] *Id.* at 6.

[9] *In re McGregor,* 172 B.R. at 721.

[10] Debtor's Memorandum, Docket No. 95 at 8.

[11] *Id.*

claims, especially mortgage loans."[12] One option is that a plan may "modify the rights of holders of secured claims...." pursuant to 11 U.S.C. § 1322(b)(2).[13] A modification under this section may include bifurcation of the claim into secured and unsecured components pursuant to 11 U.S.C. § 506(a), which provides that

> [a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.[14]

Under this approach, both the secured and unsecured components of the claim would be paid through the plan, with the unsecured component receiving a dividend, typically much less than 100%, by the Chapter 13 trustee over the term of the plan.[15] Put simply, the debtor is able to "strip off" a portion of the lien without full repayment.

Nevertheless, modification pursuant to 11 U.S.C. § 1322(b)(2) is subject to three limitations that, on a practical level, substantially reduce its availability. First, 11 U.S.C. § 1322(b)(2) expressly prohibits modification where the claim is "secured only by a secu-

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[12] *In re Pires*, 2011 WL 5330772 *3.

[13] 11 U.S.C. § 1322(b)(2).

[14] 11 U.S.C. § 506(a).

[15] *See In re Harris*, 200 B.R. 745 (Bankr.D.Mass. 1996) (modified claims must be paid through the plan).

rity interest in real property that is the debtor's principal residence."[16] Although ambiguous, the United States Court of Appeals for the First Circuit has held that this anti-modification provision "does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units."[17] Second, 11 U.S.C. § 1322(b)(2) is subject to 11 U.S.C. § 1322(d), which states that "the plan may not provide for payments over a period that is longer than ... 5 years."[18] Third, because the modified secured claim is "provided for by the plan," the plan violates 11 U.S.C. § 1325(a)(5)(B)(ii) unless it provides for payment of the present value of the modified secured claim.[19] As a result of these last two limitations, a

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[16] *Id.*

[17] *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 7 (1st Cir. 1996).

[18] 11 U.S.C. § 1322(d). The prefatory language of 11 U.S.C. § 1322(b) actually states that it is "[s]ubject to subsections (a) and *(c)* of this section," but courts have uniformly concluded that this is a drafting error resulting from the Bankruptcy Reform Act of 1994, which created a new subsection (c) and moved the five year plan limitation to a new subsection (d) without altering the cross-reference. *See, e.g., In re Koper*, 284 B.R. 747, 752 n. 10 (Bankr.D.Conn. 2002).

[19] Section 1325(a)(5)(B) provides in relevant part:

(5) with respect to each allowed secured claim provided for by the plan—

* * *

(B)(i) the plan provides that—

(I) the holder of such claim retain the lien securing

debtor must pay the secured component of the modified secured claim in full within the five year term of the plan, effectively pricing this option out of the reach of most debtors.[20]

The second option, provided by 11 U.S.C. § 1322(b)(5), is that a plan may,

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such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan....

11 U.S.C. § 1325(a)(5)(B).

[20] *See In re Pires*, 2011 WL 5330772 at *5; *In re Legowski*, 167 B.R. 711 (Bankr.D.Mass. 1994).

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due....[21]

The Bankruptcy Code does not define "maintenance of payments," but courts have interpreted this provision to mean the original contractual payments of principal and interest over the time frame specified in the note.[22] Therefore, by its own terms, 11 U.S.C. § 1322(b)(5) modifies the rights of the secured creditor only to the extent that it expressly permits the debtor to cure a default through the plan despite any contractual term to the contrary. Such a modification is made "notwithstanding" the prohibitions contained in 11 U.S.C. § 1322(b)(2).[23] Using this option, a debtor may pay a prepetition arrearage in full through the plan and, upon plan completion, the default is deemed cured and the relationship between the parties continues, governed solely by the provisions of the promissory note and mortgage.[24] Be-

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[21] 11 U.S.C. § 1322(b)(5).

[22] *See Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. 258 (D.R.I. 1998); *In re Plourde*, 402 B.R. 488 (Bankr.D.N.H. 2009); *In re Veliz*, No. 08–13292, 2009 WL 3418638 (Bankr.D.R.I. Oct. 16, 2009); *In re Kheng*, 202 B.R. 538 (Bankr.D.R.I. 1996); *In re Murphy*, 175 B.R. 134 (Bankr.D.Mass. 1994); *In re Brown*, 175 B.R. 129 (Bankr.D.Mass. 1994); *In re McGregor*, 172 B.R. at 721.

[23] *Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261.

[24] *See In re Pires*, 2011 WL 5330772 at *3.

cause the secured claim is simply riding through the bankruptcy on its original terms, it is not a "secured claim provided for by the plan" and is not subject to the present value requirement of 11 U.S.C. § 1325(a)(5)(B)(ii).[25]

The question presented is whether a debtor, through what is commonly referred to as a "hybrid plan," may bifurcate a claim pursuant to 11 U.S.C. § 506(a) and then, pursuant 11 U.S.C. § 1322(b)(5), maintain payments on the secured component for a period that exceeds the maximum five year term of the plan until it is paid in full. Several bankruptcy courts in this circuit have answered the question in the affirmative,[26] most notably *In re McGregor*, while other courts, including the United States Court of Appeals for the Ninth Circuit, have answered with a resounding "no."[27] From the outset, it is unclear where exactly hybrid plans are supposed to fit within the Bankruptcy Code—whether one of the two well-established options discussed above or something altogether different—largely because the rationales offered in support of them are somewhat fluid. In-

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[25] 11 U.S.C. § 1325(a)(5)(B)(ii).

[26] *In re Plourde*, 402 B.R. at 491–492; *In re Veliz*, 2009 WL 3418638 at *1; *In re Kheng*, 202 B.R. at 539–540; *In re Murphy*, 175 B.R. at 137; *In re Brown*, 175 B.R. at 133; *In re McGregor*, 172 B.R. at 721; *see also Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 262.

[27] *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165 (9th Cir. 2004); *In re Pires*, 2011 WL 5330772 at *7; *In re Russell*, 458 B.R. 731 (Bankr.E.D.Va. 2010); *In re Stivender*, 301 B.R. 498, 501 (Bankr.S.D.Ohio 2003); *In re Koper*, 284 B.R. at 756; *In re Legowski*, 167 B.R. at 716.

deed, a central theme of the Debtor's argument is that he is *not* proposing to modify Hyde Park's rights, suggesting that the hybrid plan now before me is one in name only and does not borrow elements from both 11 U.S.C. § 1322(b)(2) and 11 U.S.C. § 1322(b)(5).

The genesis of the hybrid plan is Judge Queenan's decision in *In re McGregor*, albeit in dicta. In *In re McGregor*, the debtor sought to bifurcate the secured creditor's claim pursuant to 11 U.S.C. § 1322(b)(2), reduce the interest rate from 10.5% to 8%, and pay the secured component of the claim over the twenty-two years remaining under the note.[28] Judge Queenan ruled that the debtor could not rely on 11 U.S.C. § 1322(b)(5) for this treatment, concluding that the change in the amount of the monthly payments occasioned by the reduced interest rate could "hardly constitute [ ] 'maintenance of payments.'"[29] Still, he went on to propose alternative treatment that he reasoned would permissibly allow for bifurcation without requiring payment in full during the term of the plan:

> The Debtor may nevertheless take advantage of 1322(b)(5) by keeping the same 10.5% contract rate and making the same payments of principal and interest called for by the note during the life of the plan and during such further period of time as is necessary to have the total principal payments equal the amount of the secured claim as

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[28] *In re McGregor*, 172 B.R. at 719.

[29] *Id.* at 721.

valued by this court. There would then be "maintenance of payments." And those payments would be maintained on the "secured claim" as that claim is computed in accordance with section 506(a). The three to five year limitation on plan payments of section 1322(c) would then have no application because section 1322(b)(5) permits payments lasting longer than five years. It speaks of maintenance of payments on a claim "on which the last payment is due after the date on which the final payment under the plan is due."

It is true that *Nobelman* [*v. American Savs. Bank*, 508 U.S. 324 (1993)] holds a proposal of payments pursuant to bifurcation constitute modification of the "rights" of the holder of the secured claim within the meaning of section 1322(b)(2). Presumably, if only subsection (b)(2) were applicable, the payments would have to be completed within five years. But subsection (b)(5) provides independent support for such a plan. Subsection (b)(5) does not require the plan proponent to avoid modification of the "rights" of the secured claim holder. Its command is complied with so long as payments are maintained on the "secured claim." The amount of the secured claim is determined by valuation pursuant to section 506(a). This wording avoids the fine distinction made in *Nobelman*, based on the wording of subsection (b)(2), between modification of the "rights" of a secured claim holder and modification of the "secured claim." Subsection (b)(5), moreover, provides that its provisions control "notwithstanding

paragraph (2) of this subsection."[30]

In sum, Judge Queenan reasoned that 11 U.S.C. § "1325(b)(5) permits payments lasting longer than five years" without "requir[ing] the plan proponent to avoid modification of the 'rights' of the secured claim holder ... so long as payments are maintained on the 'secured claim.'"[31] That said, the rationale is ambiguous with respect to whether the debtor is, in fact, modifying the secured claim holder's rights. On the one hand, Judge Queenan conceded that the Supreme Court of the United States held that "a proposal of payments pursuant to bifurcation constitute[s] modification of the 'rights' of the holder of the secured claim within the meaning of section 1322(b)(2)," and that "[s]ubsection (b)(5) does not require the plan proponent to avoid modification of the 'rights' of the secured claim holder," but then stated that "[t]he amount of the secured claim is determined by valuation pursuant to section 506(a) ... avoid[ing] the fine distinction made in *Nobelman* ... between modification of the 'rights' of a secured claim holder and modification of the 'secured claim.'"[32] His final bare reference to the "notwithstanding paragraph (2) of this subsection" language in 11 U.S.C. § 1322(b)(5) further confuses matters.

The Debtor, purporting to rely on *In re McGregor's* reasoning, asserts that "equat[ing] bifurcation of a claim into secured and unsecured portions pursu-

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[30] *Id.*

[31] *Id.*

[32] *Id.*

ant to [section] 506(a) with modification of a creditor's rights pursuant to section 1322(b)(2) would ... be inaccurate...."[33] In an apparent nod to Judge Queenan's focus on "valuation pursuant to section 506(a)," the Debtor contends that 11 U.S.C. § 506(a) simply defines the secured claim without modifying the creditor's rights. Admittedly, *In re McGregor* is susceptible to that reading and other courts have reached the same conclusion.[34] The problem is that the Supreme Court expressly rejected that argument in *Nobelman*.

In *Nobelman*, the debtor proposed a Chapter 13 plan seeking to bifurcate the bank's secured claim pursuant to 11 U.S.C. § 506(a) such that he would make the contractual mortgage payments only up to the amount of the secured component of the claim and treat the remainder as an unsecured debt, which would receive nothing under the plan.[35] The bank's claim, however, was secured only by the debtor's principal residence.[36] Both the bank and the Chapter 13 trustee objected on the basis that 11 U.S.C. § 1322(b)(2) prohibits such a modification, but the debtor argued the plan contained no such modification because 11 U.S.C. § 506(a) automatically ad-

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[33] Debtor's Memorandum, Docket No. 95 at 8.

[34] *See, e.g., In re Kheng*, 202 B.R. at 539 (holding bifurcation is not a modification of the creditor's rights); *In re Murphy*, 175 B.R. at 137 n. 2 (suggesting that the question remains open as to whether bifurcation alone modifies the rights of the secured claim holder).

[35] *Nobelman v. American Savs. Bank*, 508 U.S. at 326.

[36] *Id.*

justs the bank's claim to account for the unsecured portion before any disposition is proposed through the plan.[37] As such, he continued, the bank's rights as the holder of the secured claim remain untouched despite the unconditional modification unsecured claim.[38] The Supreme Court rejected the debtor's interpretation as failing "to take adequate account of § 1322(b)(2)'s focus on 'rights,' " noting that the bank nonetheless remained the holder of a secured claim despite bifurcation of its claim.[39] The Supreme Court went on to hold that the bank's rights arising from the relevant mortgage instruments are not limited by the valuation of its secured claim and are protected from modification by 11 U.S.C. § 1322(b)(2).[40] Although *Nobelman* involved a claim secured only by the debtor's principal residence, the holding makes clear that bifurcation pursuant to 11 U.S.C. § 506(a) is, by itself, a modification of the secured creditor's rights pursuant to 11 U.S.C. § 1322(b)(2).

For the sake of completeness, I note that in *In re Pires*, Chief Judge Bailey also rejected the possibility that 11 U.S.C. § 1322(b)(5), by itself, authorizes modification of the secured claim,[41] an idea perhaps arising from Judge Queenan's statement that "subsection (b)(5) provides *independent* support for such a

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[37] *Id.* at 328.

[38] *Id.*

[39] *Id.* at 328–329.

[40] *Id.* at 329–330

[41] *In re Pires*, 2011 WL 5330772 at *7.

plan."[42] While I find such an argument inherently at odds with *Nobelman*, I agree with Chief Judge Bailey that interpreting 11 U.S.C. § 1322(b)(5) as a modification provision otherwise presents insurmountable difficulties in the construction of and interplay between 11 U.S.C. §§ 1322 and 1325(a).[43] Most notably, such a reading would relieve the debtor of 11 U.S.C. § 1322(b)(2)'s restriction on the modification of a claim "secured only by a security interest in real property that is the debtor's principal residence,"[44] and would, in effect, "have Congress giving with the one hand precisely what it took away with the other...."[45] This cannot be as "a cardinal principle of statutory construction is that a statute ought, on the whole, to be so construed that ... no clause, sentence, or word shall be superfluous, void, or insignificant."[46]

This, however, does not end the inquiry, but merely shifts it to an alternative interpretation of *In re McGregor* that does not avoid modification of the secured creditor's rights, but embraces it. Under this formulation, that the debtor first modifies the claim pursuant to 11 U.S.C. § 1322(b)(2), albeit by bifurcating the claim under 11 U.S.C. § 506(a), and then cures the arrearage and maintains the contractually due payments pursuant to 11 U.S.C. § 1322(b)(5) until the secured component of the modified claim is

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[42] *In re McGregor*, 172 B.R. at 721 (emphasis added).

[43] *In re Pires*, 2011 WL 5330772 at *5–7.

[44] 11 U.S.C. § 1322(b)(2).

[45] *In re Pires*, 2011 WL 5330772 at *6.

[46] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

paid in full. Several courts have endorsed this view, holding that 11 U.S.C. § 1322(b)(2) and (b)(5) are not mutually exclusive.[47] In support, these courts note that 11 U.S.C. § 1322(b)(1)-(11) are connected by the conjunctive "and,"[48] and that 1325(b)(5) expressly provides for curing defaults and maintaining payments "on *any* unsecured claim or secured claim,"[49] suggesting that the secured portion of an undersecured claim qualifies.[50]

Ultimately, trying to reconcile subsections (2) and (5) of 11 U.S.C. § 1322(b) with each other emphasizes the critical infirmity contained within *In re McGregor*. The conceit upon which *In re McGregor* is premised is that 11 U.S.C. § 1322(b)(5) authorizes something that 11 U.S.C. § 1322(b)(2) does not. As explained by Judge Dabrowski of the United States Bankruptcy Court for the District of Connecticut in *In re Koper:*

> *McGregor* and its progeny focus, if at all, on the fact that subsection (b)(5), by its terms, addresses claims "on which the last payment is due after

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[47] *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261; *In re Elibo*, 447 B.R. 359 (Bankr.S.D.Fla. 2011); *In re Plourde*, 402 B.R. at 492; *In re Veliz*, 2009 WL 3418638 at *1.

[48] 11 U.S.C. § 1322(b).

[49] 11 U.S.C. § 1322(b)(5) (emphasis added). I note, however, that the statute does not say "any ... secured claim," but "any ... secured claim *on which the last payment is due after the date on which the final payment under the plan is due* ...." *Id.*

[50] *See, e.g., Fed. Nat'l Mortg. Ass'n v. Ferreira*, 223 B.R. at 261; *In re Plourde*, 402 B.R. at 492; *In re Veliz*, 2009 WL 3418638 at *1.

> the date on which the final payment under the plan is due" (hereafter, the "Long Term Debt Reference"). In essence, these authorities interpret the Long Term Debt Reference as a license for long term *treatment, i.e.* treatment which extends beyond the permissible duration of a plan.[51]

This Long Term Debt Reference, however, merely identifies the type of claim to which 11 U.S.C. § 1322(b)(5) applies—not just any secured claim, but "any ... secured claim on which the last payment is due after the date on which the final payment under the plan is due"[52]—it grants no substantive license to extend payments past the expiration of the plan.[53] To the contrary, the only permissive statement in the subsection is that the plan may "provide for ... maintenance of payments *while the case is pending*."[54] Moreover, when Judge Queenan stated that "[t]he three to five year limitation on plan payments of section 1322[(d)] would then have no application because section 1322(b)(5) permits payments lasting longer than five years," he failed to consider that 11 U.S.C. § 1322(b)(5) is also expressly subject to the subsection (d).[55] To the extent that payments continue past the expiration of the plan, it is only because

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[51] *In re Koper*, 284 B.R. at 747 (emphasis in original).

[52] 11 U.S.C. § 1322(b)(5).

[53] *In re Pires*, 2011 WL 5330772 at *6; *In re Koper*, 284 B.R. at 754.

[54] 11 U.S.C. § 1322(b)(5) (emphasis added).

[55] *In re Pires*, 2011 WL 5330772 at *6; *In re Koper*, 284 B.R. at 754.

original terms of the obligation were not modified and the secured claim is not provided for by the plan.

Undoubtedly, the Debtor would argue—had he realized that *Nobelman* expressly holds that a bifurcation of a claim is a modification of rights under 11 U.S.C. § 1322(b)(2)—that even post-modification, the date upon which the final payment required to retire the debt is made would still be a date after the final plan payment would be due. In other words, bifurcation of a claim, without more, only modifies some rights of the holder of the secured claim and the proposed treatment can still fit within the meaning of "maintenance of payments" under 11 U.S.C. § 1322(b)(5). I disagree. First, 11 U.S.C. § 1322(b)(5) contemplates a due date for the secured claim's final payment, not a date upon which the aggregate maintained contractual payments fully amortize the secured component of the claim. Second, and more importantly, regardless of its scope, a bifurcation of a claim is a modification under 11 U.S.C. § 1322(b)(2), and claims so modified must be paid through the plan.[56] Third, simply by virtue of the modification itself, the secured claim is "provided for by the plan" as the plan redefines the payment terms,[57] rendering it subject to the confines of 11 U.S.C. §§ 1322(d) and 1325(a)(5)(B)(ii).[58] Section 1325(b)(5) offers no relief

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[56] *See In re Harris*, 200 B.R. at 748–749.

[57] *In re Russell*, 458 B.R. at 739 (noting that when the plan defines the terms of payment, the payments are made "under" the plan regardless of whether the payments are to be made through the Chapter 13 trustee or directly to the creditor).

[58] *In re Pires*, 2011 WL 5330772 at *6; *In re Russell*, 458 B.R. at 739; *In re Legowski*, 167 B.R. at 715–716.

from these provisions, particularly as it is expressly no less subject to the requirements of 11 U.S.C. § 1322(d) than 11 U.S.C. § 1322(b)(2).

The Debtor urges that this reading renders both 11 U.S.C. §§ 506(a) and 1322(b)(5) moot. While I agree that 11 U.S.C. §§ 1322(d) and 1325(a)(5)(B)(ii) may limit the availability of 11 U.S.C. § 506(a) for most Chapter 13 debtors—a consequence that is well-established under 11 U.S.C. § 1322(b)(2) and the reason why the hybrid plan was conceived—it is hardly moot. Similarly, it is grossly inaccurate to suggest it renders 11 U.S.C. § 1322(b)(5) moot because even in the absence of bifurcation, curing prepetition defaults and maintaining payments remains the most viable option for the average Chapter 13 debtor. In contrast, the Debtor's interpretation of the interplay of these provisions would render the restrictions placed on 11 U.S.C. § 1322(b)(2) modifications superfluous.[59]

For all these reasons, I find that 11 U.S.C. §§ 1322(b)(2) and (5) are mutually exclusive and that a plan that proposes to both modify the rights of the secured claim holder and thereafter cure and maintain payments on the secured portion of the claim for a period that exceeds the term of the plan cannot be confirmed over the creditor's objection.

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[59] *TRW Inc. v. Andrews*, 534 U.S. at 31

V. *CONCLUSION*

In light of the foregoing, I will enter an order sustaining the Objection and directing the Debtor to file a further amended plan within thirty days.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

1. Section 158 of Title 28 of the United States Code provides in pertinent part:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * * * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the

first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in

subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

2. Section 1291 of Title 28 of the United States Code provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Unit-

ed States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.